

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER, * Case No. 1:14CV333
*
Plaintiff, *
*
vs. * Greensboro, North Carolina
* January 13, 2017
DISH NETWORK, L.L.C., * 9:30 a.m.
*
Defendant. *

DAILY TRANSCRIPT OF TRIAL TESTIMONY
BEFORE THE HONORABLE CATHERINE C. EAGLES,
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Plaintiff: JOHN W. BARRETT, ESQUIRE
BRIAN A. GLASSER, ESQUIRE
Bailey & Glasser, LLP
209 Capitol Street
Charleston, West Virginia 25301

MATTHEW P. MCCUE, ESQUIRE
Law Office of Matthew P. McCue
1 South Avenue, Third Floor
Natick, MA 01760

JACOB M. NORRIS, ESQUIRE
The Norris Law Firm
1033 Bullard Court, Suite 207
Raleigh, North Carolina 27615

For the Defendant: PETER A. BICKS, ESQUIRE
ELYSE D. ECHTMAN, ESQUIRE
JOHN L. EWALD, ESQUIRE
Orrick Herrington & Sutcliffe, LLP
51 West 52nd Street
New York, New York 10019

1 RICHARD J. KESHIAN, ESQUIRE
2 Kilpatrick Townsend & Stockton, LLP
3 1001 W. Fourth Street
Winston-Salem, North Carolina 27101

4 Court Reporter: Lori Russell, RMR, CRR
5 P.O. Box 20593
Winston-Salem, North Carolina 27120

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	I N D E X	
1	Plaintiff Witnesses:	Page
3	ANYA VERKHOVSKAYA	
4	Direct Examination by Mr. Barrett	8
5	Cross-Examination by Ms. Echtman	19
6	Redirect Examination by Mr. Barrett	135
7	Recross-Examination by Ms. Echtman	142
7	Defense Witnesses:	Page
8	JAMES DEFRANCO	
9	Direct Examination by Mr. Bicks	150
10	Cross-Examination by Mr. Glasser	192
11	Redirect Examination by Mr. Bicks	202
12	Recross-Examination by Mr. Glasser	204
13	DEFENSE EXHIBITS	
14	NO.: DESCRIPTION:	IDENT ADMIT
15	DX3	171
16	DX16	64
17		
18		
19		
20		
21		
22		
23		
24		
25		

PROCEEDINGS

THE COURT: Good morning. I think we might still be waiting on a juror or two.

4 | THE CLERK: Yes.

5 **THE COURT:** But I forgot to mention yesterday -- I
6 know we all heard the juror, Ms. Burgess, as she was leaving
7 the courtroom, speak to the witness. I have never had that
8 happen before, even though the jurors walk, you know, right by
9 the witness stand. So, I think I'll do two things.

10 One, I'll have the witness step down before the jury steps
11 out going forward through the trial just to prevent that from
12 happening again. It will add 30 seconds, but that's okay. And
13 then, I'll just remind the jurors not to talk about the case or
14 speak to any of the witnesses. So just on that one. Then
15 that's what I intend to do about that.

I went back and looked at my order on the motion in limine,
and I, you know, still -- I guess I'm still having a little
trouble understanding exactly what DISH is saying about this.
That motion and my order were very specific. It just says:
DISH cannot use Exhibits 31A to 31S or testimony related to
Dr. Aron's supplemental report. That's all it says. So it
doesn't prevent DISH from asking the witness questions or
showing the witness other documents that were disclosed in
discovery and identified as exhibits.

25 So, you know, there's two questions. One is, you know, how

1 many numbers in each of these buckets? You all have resolved
2 all of that, so that's one. And then the other is whether
3 these buckets -- where there's liability for these buckets,
4 and, you know, the Defendant can ask questions about that.

5 So, I don't understand -- I guess I'm having a lot of
6 trouble understanding exactly what the Defendant wants me to
7 do. It doesn't -- I don't know. The argument did not seem to
8 actually be consistent with what my order said.

9 So, if I'm misunderstanding something, we can address that
10 at the appropriate time. But, I did go back and just confirm
11 my memory of that order, and, you know, that's what it says,
12 and I'm not going to change that. So -- but that is a fairly
13 limited order. So, certainly, the Defendant can cross-examine
14 the witness otherwise.

15 And I understand they are going to raise all of these
16 issues in the -- that we've been talking about that are in the
17 draft verdict sheet, and, you know, that's entirely
18 appropriate. And for that reason, I'm going to let the
19 Plaintiff ask some questions about it.

20 It's not new opinions. That's just the opinions the
21 witness has. So is there anything else we need to take up
22 before the clerk goes to check on the jurors for the Plaintiff?

23 **MR. BARRETT:** No, Your Honor. I just wanted to make
24 clear that the types of questions we would ask the witness
25 about the categories, were, number 1, just to explain what that

1 means. It's not self-evident what it means to say unknown in
2 the LexisNexis data.

3 **THE COURT:** Uh-huh.

4 **MR. BARRETT:** So that's one question. The second
5 question is -- is, you know, why did you not exclude those
6 numbers from your report, the one that was disclosed? So I
7 want it to be clear that those are the types of questions I
8 believe consistent with the discussions we had yesterday that I
9 would like to ask.

10 **THE COURT:** Okay. Oh, I did see the Defendant -- I
11 forgot this. I did see the Defendant's motion about calling
12 Ms. McRae as an impeachment expert -- not expert -- fact
13 witness. Pardon me. And if the jurors are all here, I would
14 propose to deal with that at the break or at lunch. If the
15 jurors are not here, we can talk about it now.

16 **MR. EWALD:** And that's perfectly fine, Your Honor.
17 And we wanted to give you a head's up before filing that
18 yesterday, but when you had to leave -- when you had to
19 leave --

20 **THE COURT:** Yeah.

21 **MR. EWALD:** -- we didn't get a chance to raise it.

22 **THE COURT:** Right. Well, it's a good thing we
23 stopped -- we let the jury go 10 minutes early because we were
24 in here 25 minutes after that.

25 Okay. Can you go check on the jurors, and if they're all

1 here, they can come on in. If they're not, come back and let
2 me know.

3 **MR. BICKS:** Your Honor, can I just ask on scheduling
4 today in terms of --

5 **THE COURT:** One second.

6 (Pause in the proceedings.)

7 **THE COURT:** Okay. Say again.

8 **MR. BICKS:** In terms of scheduling today, if we end up
9 ending a little bit early with witness moving around and things
10 like that, is that going to be something --

11 **THE COURT:** That depends on what a little bit early
12 means. We're not going to stop at two o'clock --

13 **MR. BICKS:** Right.

14 **THE COURT:** -- or three o'clock, but, you know, if
15 it's 4:30, I'm probably not going to jump up and down as long
16 as you assure me we're going to get done with the evidence on,
17 you know, no later than Wednesday.

18 **MR. BICKS:** Yes.

19 **THE COURT:** You know, so we'll just see how it goes.
20 I don't have any problem stopping a little early, but, you
21 know --

22 **MR. BICKS:** Yeah.

23 **THE COURT:** -- I don't want to keep the jurors. They
24 all are missing work and other obligations, so -- but we --
25 we've been stopping a little bit early for those kinds of

1 things. I have no problem with that.

2 **THE CLERK:** They're all here.

3 **THE COURT:** All right. You can tell them to come on
4 in, or somebody can tell them to come on in.

5 Is the witness -- where is the witness?

6 **MR. BARRETT:** Your Honor, she's outside.

7 (The witness entered the courtroom.)

8 (The jury entered the courtroom.)

9 **THE COURT:** All right. Good morning. Ms. Burgess,
10 are you feeling better?

11 **JUROR NO. 6:** Yes. Thank you.

12 **THE COURT:** Great. Okay. The witness can come back
13 up to the witness stand.

14 (The witness returned to the witness stand.)

15 **THE COURT:** And Mr. Barrett, you can continue with
16 your examination.

17 **MR. BARRETT:** Thank you, Your Honor. May the monitors
18 please be turned on?

19 **DIRECT EXAMINATION (Continued)**

20 **BY MR. BARRETT:**

21 Q. Good morning.

22 A. Good morning.

23 Q. Ms. Verkhovskaya, when we left off yesterday, you were
24 looking at a stipulation, and I believe the funnel that you
25 have testified to, and I'd like to resume questioning on that.

1 But before I do that, you testified that at A.B. Data you had
2 handled somewhere in the range of 1,000 class action data
3 analysis projects; is that right?

4 A. That's correct.

5 Q. And you have worked with my firm before?

6 A. Yes, we have.

7 Q. On approximately how many of those 1,000 cases?

8 A. Less than 10, I believe.

9 Q. And you are being compensated for your work in this case?

10 A. Not me personally. My firm.

11 Q. Okay. And about how much have you charged to date for your
12 work in this case?

13 A. Well, it's not just my work. It's the work of all these
14 people that I've mentioned over the past several years. I
15 believe the total compensation -- I don't have the exact
16 numbers. Between 25 and 35,000 for everybody for all these
17 years.

18 Q. Okay. I'd like to put the stipulation that we were
19 discussing back on the screen. But, before I do that, I just
20 want to be clear. I want to ask you a number of questions
21 about this aspect of the funnel, okay, your removal of 1,393
22 business and LexisNexis business numbers. Do you see that?

23 A. Yes, I do.

24 Q. That's where I want to direct my questioning today. Now,
25 back to the stipulation. And for purposes of our record, I was

1 referring to what we've marked as Plaintiff's Exhibit 2008.

2 Now, I'm referring to the amended joint stipulation
3 regarding call categories. Do you see that?

4 A. Yes, I do.

5 Q. And that's the parties, Plaintiff Thomas H. Krakauer and
6 Defendant DISH Network, hereby stipulate and agree as follows.
7 Do you see that?

8 A. Yes, I do.

9 Q. Okay. The next -- I'm want to talk to you about
10 paragraph 1. And I want to ask you two questions about it.
11 I'm going to explain what the questions are, and then I'm going
12 to ask you to answer. Okay?

13 A. Okay.

14 Q. The first question is what does this -- what does this
15 mean: Telephone numbers that LexisNexis always identifies as
16 unknown. That's the first question I'm going to ask you, so
17 you can explain what that means to the jury; okay?

18 **THE COURT:** Are you asking her now?

19 **MR. BARRETT:** Not now. No, ma'am.

20 **THE COURT:** Okay. Go on, then.

21 **BY MR. BARRETT:**

22 Q. And the second question I'm going to ask you is why did you
23 not exclude those numbers from the report that you provided to
24 DISH Network in this case; okay?

25 A. Okay.

1 Q. Question number 1 regarding paragraph 1, what does this
2 mean: Telephone numbers that LexisNexis always identifies as
3 unknown? And if you could explain that to the jury, please.

4 A. Sure. Well, in my original expert opinion, there was no
5 such category as unknown because, in my opinion, that category
6 doesn't exist. LexisNexis does not really identify any numbers
7 as unknown.

8 In the LexisNexis data, when -- as outlined in my original
9 expert opinion, the categories are business, government, and
10 residential. There are several -- well, I should say a number
11 of rows that are left blank.

12 Q. Did you say rows, R-O-W-S?

13 A. Yes.

14 Q. And you meant by that -- what do you mean by that?

15 A. A record.

16 **THE COURT:** What?

17 **THE WITNESS:** Or a transaction or a record.

18 **BY MR. BARRETT:**

19 Q. From the LexisNexis data?

20 A. Correct.

21 Q. Okay. So, LexisNexis, you put a phone number -- you give a
22 phone number to LexisNexis, and LexisNexis provides you with
23 data about that telephone number; right?

24 A. Correct. But LexisNexis never identified any telephone
25 number as unknown.

1 Q. Unknown in category?

2 A. Correct.

3 Q. Okay. And --

4 A. So, my assumption is that the stipulation here refers to
5 records where LexisNexis does not identify them as businesses
6 and does not identify them as government. Okay? However, the
7 standard of LexisNexis database is such that if they don't have
8 a source document that identifies that telephone number as
9 residential, they leave it blank.

10 To give you an example, when LexisNexis downloads credit
11 bureau data, when one fills out an application for a credit
12 card, they sometimes click residential at the phone number on
13 the application. Unless LexisNexis has that box checked as
14 residential next to the telephone number and they have source
15 to prove it --

16 **THE COURT:** And they have what? Can you back away
17 from the mike a little? There's a little feedback.

18 **THE WITNESS:** And they have a source to prove that an
19 individual identified that phone number as residential, they
20 leave it blank. But they don't say it's unknown. They say
21 it's not business, it's not government, and it's not -- they
22 don't have a source where a consumer or an individual
23 identified that number as residential. So, they leave it
24 blank, but they never say that it's unknown.

25 In my expert opinion, as I outlined in my original report

1 right here, all those telephone numbers are more likely or not
2 residential.

3 **BY MR. BARRETT:**

4 Q. Did you review the LexisNexis data that you received back
5 when you did your report regarding Dr. Krakauer's telephone
6 number?

7 A. Yes.

8 Q. And how is that identified in the LexisNexis data?

9 A. In the LexisNexis data, the records for Mrs. Krakauer --
10 for Mr. Krakauer identified as blank in the field of whether it
11 is a business or government or residential. So, it is my
12 expert opinion that Mr. Krakauer's telephone numbers are
13 residential.

14 Q. And were you here for his testimony yesterday -- I believe
15 yesterday morning when he -- actually two mornings ago, when he
16 explained that he had had his number since 1985, and it was his
17 residential telephone number?

18 A. That's correct.

19 Q. And so, is that consistent with the information you
20 received back from LexisNexis?

21 A. Yes, it is.

22 Q. Is there other information that supports your conclusion
23 that these telephone numbers -- other information regarding the
24 facts of this case that supports your conclusion that these
25 telephone numbers should remain residential?

1 A. Yes.

2 Q. And what is that?

3 A. Well, as we've heard over a period of several days, SSN was
4 focused on selling DISH services to residences, and that's what
5 they are going to be paid for.

6 Q. And further, you -- just to go back to PX2008, we discussed
7 this yesterday, you removed 1,393 telephone numbers, correct,
8 when you did your report because they were associated with
9 businesses?

10 A. Correct. They were associated with businesses on -- there
11 was one category that was associated with businesses in Five9
12 records and another category, all the phone numbers that were
13 identified by LexisNexis as businesses or government.

14 Q. So just to be clear, Dr. Krakauer's number is one of the
15 telephone numbers that LexisNexis always identified as unknown
16 as reflected on this stipulation?

17 A. That's correct.

18 Q. Okay. Paragraph 2. I would like to ask you the same two
19 questions. First, what does this mean: Telephone numbers that
20 LexisNexis identifies as residential before May 1, 2010, or
21 after May -- August 1, 2011. Okay.

22 So what -- what does that mean, and then I'll get to why
23 did you not exclude those telephone numbers in your original
24 report and your conclusion that the numbers were residential?
25 But, first, what does that mean?

1 A. As outlined in my original report, these -- the bucket of
2 these telephone numbers is not treated separately in my
3 original report and in my opinion, because, in my expert
4 opinion --

5 Q. Well, first of all, just, if you will, explain what this
6 means, telephone numbers that LexisNexis identifies as
7 residential before May 1, 2010 or after August 1, 2011. Just
8 explain what that means.

9 A. Sure. When LexisNexis -- remember, I gave you that example
10 of an individual going to fill out an application to identify
11 that the telephone number is residential. As you may remember,
12 every time you fill out an application like that, you sign it
13 and date it.

14 Well, that date, when you identify a telephone number as
15 residential, goes onto the LexisNexis database as first seen
16 date. That's how they refer to it internally. So, when
17 LexisNexis downloads the data, they can only refer to the date
18 of identification which type of telephone number that is based
19 on the source date. So, we obviously cannot have daily
20 confirmations that the telephone number is residential. We
21 have a time frame when LexisNexis first seen a record from the
22 source date identifying that the telephone number is
23 residential. And that first seen and last seen date is
24 included in my original report, and it shows that I included
25 that date in formulating my original opinion.

1 So, these numbers of records discussed in number two, that
2 category, have identification of first seen date as residential
3 before the class period of May 1, 2010. And the reason I
4 included those numbers in my original opinion is because
5 LexisNexis downloads data very frequently, sometimes several
6 times a day from various sources. And that number or that set
7 of numbers never, ever appeared until the end of class period
8 under any business directory.

9 So, therefore, it is my expert opinion that these numbers
10 more likely or not remained residential throughout the class
11 period. It's just common logic.

12 Q. And so, that is what you stated in your report, correct,
13 when you said that 22,232 numbers were residential, right?

14 A. That is correct.

15 Q. So you did not exclude telephone numbers that LexisNexis
16 identifies as residential before the class period or after the
17 class period from your 22,232 numbers; correct?

18 A. That's correct.

19 Q. Okay. And you had testified that -- you'd heard the
20 testimony about SSN selling residential --

21 A. That is correct.

22 Q. -- not selling commercial numbers?

23 A. That is correct.

24 Q. Commercial accounts? And is that further evidence in
25 support --

1 **THE COURT:** Okay. I think you asked that, and she's
2 answered it several times.

3 **MR. BARRETT:** Okay.

4 **BY MR. BARRETT:**

5 Q. Paragraph 3. Telephone numbers that LexisNexis identifies
6 as unknown in the May 2010 to August 2011 time period, calls
7 were made but identifies differently at other times. What does
8 that mean?

9 A. Well, that means -- and I apologize if I sound repetitive,
10 but it does mean the same thing. In my expert opinion, these
11 numbers were included in my report, and they're part of 22,232
12 numbers because LexisNexis identified them as nonbusinesses and
13 non-government. However, the date of last seen, first seen was
14 such that, at times, those records were blank, and, at times,
15 those records were identified as residential. It was and still
16 is my expert opinion that those records are more likely or not
17 residential.

18 Q. Paragraph 4 of the stipulation. Telephone numbers -- and
19 if your answer is the same with respect to this, you may say
20 that.

21 A. Thank you.

22 Q. If your answer is different, you may explain that.
23 Telephone numbers that LexisNexis identifies as both
24 residential and unknown. What is that -- what does that mean?

25 A. My answer is the same.

1 Q. As with respect to your previous answers?

2 A. That's correct.

3 Q. I want to ask you about this, number 5, telephone numbers
4 that LexisNexis always identifies as residential, including in
5 the May 2010 to August 2011 time period that the calls were
6 made. I think we know what that means.

7 A. I wrote a big opinion on that.

8 Q. Yes.

9 A. My answer is the same.

10 Q. The sixth paragraph. Telephone numbers that LexisNexis
11 identifies as cellular and possibly cellular. Of course, we
12 all know what cellular means, right, cell telephone numbers?

13 A. Correct. And, in my original opinion, I did not separate
14 cellular numbers because it has no bearing on whether cellular
15 business or cellular residence. My answer is the same. Those
16 cellular numbers are still more likely or not residential.

17 And I just do want to add that if there were any businesses
18 throughout any of those six categories that were removed in
19 prior steps.

20 Q. And, Ms. Verkhovskaya, the opinions that you have expressed
21 on the witness stand today and yesterday, do you hold those
22 opinions to a reasonable degree of certainty in your field of
23 data analysis?

24 A. Yes, I do.

25 Q. Thank you.

1 MR. BARRETT: No further questions.

THE COURT: All right. Questions for the Defendant?

3 **MS. ECHTMAN:** Thank you. If I might just have the
4 microphone? Do you have the microphone?

5 MR. BARRETT: Yes. Your Honor, may I?

6 THE COURT: Yes, uh-huh.

7 (Portable microphone handed to Ms. Echtman.)

8 MS. ECHTMAN: Can everyone hear me?

10 MS. ECHTMAN: Great. Thank you.

12 BY MS. ECHTMAN:

13 || Q. Well, good morning.

14 A. Good morning.

15 O. Ms. Verkhovskaya, am I pronouncing your name correctly?

16 A. Yes. Thank you.

17 Q. Terrific. Okay. So I just want to go through a few things
18 and make sure we're all on the same page. You talked a little
19 bit, when you first got on the stand yesterday, about your
20 qualifications, and you said you've worked with data your whole
21 life; is that right?

22 A. That's correct.

23 Q. Okay. And are you self-taught in working with data? Did
24 you teach yourself?

25 A. That was part of the process, but over 25 years of intense

1 experience.

2 Q. But I just want -- you don't have formal training in data
3 analysis, but you've worked with data for a very long?

4 A. That's correct.

5 Q. But you haven't taken formal courses of any kind?

6 **THE COURT:** You mean academic?

7 **BY MS. ECHTMAN:**

8 Q. Academic or even training seminars.

9 A. That's correct.

10 Q. And am I right that you haven't taken statistics courses
11 either?

12 A. I took statistics in college.

13 Q. Oh, do you recall saying at your deposition that you hadn't
14 taken any courses relating to statistics?

15 A. Any additional courses.

16 Q. Well, I think the question -- well, let's -- can we just go
17 to -- I thought you said at your deposition -- when you were
18 asked, have you ever taken any courses relating to statistics,
19 you said no. Was that mistaken?

20 A. As I recall it, that was a conversation about my
21 post-college education, but I did take a course in statistics
22 in college.

23 Q. Okay. Okay. And here what you did is you analyzed
24 telephone records based on criteria given to you by Plaintiff's
25 counsel; is that right?

1 A. No, that's not correct.

2 Q. Okay. Well, did you at deposition identify your area of
3 expertise for this case as analyzing telephone records based on
4 criteria that was given to you by Plaintiff's counsel?

5 A. Part of the criteria was given to us by Plaintiff's
6 counsel, absolutely.

7 Q. Okay. So that's what you had said, right?

8 A. Correct.

9 Q. Okay. All right. And you talked about -- you do a lot of
10 work on class actions, right? I think you talked about that,
11 right?

12 A. Correct.

13 Q. Okay. And I think Mr. Barrett asked you. You've worked on
14 more than a thousand class actions?

15 A. Correct.

16 Q. And you're a co-founder, a partner, and chief operating
17 officer of a portion of A.B. Data called A.B. Data Class Action
18 Administration?

19 A. As I testified earlier today, that was my prior occupation,
20 not current occupation.

21 Q. Okay. So when did you make that switch? Very recently?

22 A. Very recently, yes.

23 Q. But you're still affiliated with A.B. Data Class Action
24 Administration?

25 A. I'm currently consulting with them on a very limited basis

1 to help them to transition.

2 Q. And so now you're at a new firm called DRRT; is that right?

3 A. That's correct.

4 Q. And DRRT is a subsidiary of a law firm?

5 A. It is a law firm.

6 Q. Oh, it is a law firm. Okay. But you're not a lawyer,
7 right?

8 A. I'm not.

9 Q. But A.B. Data Class Action Administration, that's the
10 company that you worked for when you did the work in this case;
11 is that right?

12 A. That's correct.

13 Q. And that company's business is class actions, right?

14 A. That's correct.

15 Q. And at DRRT, are you going to continue to be doing class
16 action work?

17 A. It's a securities class action firm, but my job would be to
18 manage the law firm. I will be the managing director, and I'm
19 going to continue focusing on data work, handling data for
20 various financial clients that we have throughout the world, as
21 well as continue my expert analysis data work.

22 Q. Okay. So the more class actions there are, the better it
23 is for A.B. Data Class Action Administration because that's --
24 that's what they do, right?

25 A. Well, I can't comment on them -- on what they're going to

1 continue doing in the future, but I guess they're in business
2 assisting law firms and being appointed by courts to administer
3 and handle various class actions.

4 Q. And one of the things that A.B. Data does for class actions
5 and one of the things, when you were there until very recently,
6 they did was they got -- they get hired and paid to send
7 notices to individuals who might be part of a class action,
8 right?

9 A. That's correct.

10 Q. And did A.B. Data do that in this case? A.B. Data handled
11 sending notices to people who might be part of this class?

12 **MR. BARRETT:** Objection, based upon the Court's prior
13 rulings.

14 **THE COURT:** Can you step up to the corner here?

15 (The following bench conference was recorded.)

16 **THE COURT:** Speak closer to the mike.

17 **MS. ECHTMAN:** I'm not going to get into, you know, who
18 the class matters might be. I'm going to talk about what she
19 does and what her motivation is and that, you know, basically
20 she -- she makes her living on the plaintiff side --

21 **THE COURT:** Right.

22 **MS. ECHTMAN:** -- of class actions.

23 **THE COURT:** When you talked about prior ruling, I
24 wasn't sure what you are were talking about. I just went over
25 --

1 **MS. ECHTMAN:** I'm not going to get into subscriber
2 issues.

3 **MR. BARRETT:** -- names.

4 **MS. ECHTMAN:** I'm not going to get into that.

5 **THE COURT:** Well, she can answer that one question.

6 **MR. BARRETT:** Yes.

7 **MS. ECHTMAN:** Okay.

8 (Conclusion of the bench conference.)

9 **THE COURT:** Go ahead. You can repeat your question.

10 **MS. ECHTMAN:** All right. Well, can the court reporter
11 read it back? Is that an option?

12 **THE COURT:** Or just rephrase it.

13 **BY MS. ECHTMAN:**

14 Q. Okay. I think my last question was did A.B. Data handle
15 the job of sending out notice to the people who might be in
16 this class?

17 A. Yes.

18 Q. And A.B. Data got paid for that, right?

19 A. Yes.

20 Q. Okay. And when you mentioned how much you were paid so far
21 for your expert work, were you including what A.B. Data got
22 paid for sending out the notices?

23 A. I don't believe so.

24 Q. And then in terms of what A.B. Data does -- and you worked
25 with A.B. Data for a long time, right?

1 A. Correct.

2 Q. And if a class action happens to settle, and there's money
3 to be paid to the class, A.B. Data -- one of the things that
4 A.B. Data Class Action Administration does is it handles the
5 distribution of the funds?

6 A. If we are fortunate enough to be picked and appointed by
7 the court as an administrator, it is a job of an administrator
8 to distribute the funds to the class.

9 Q. And A.B. Data Class Action Administration gets paid for
10 doing that, right?

11 A. Yes.

12 Q. And so in the event that any money might be awarded to
13 class members in this case by the jury here, then A.B. Data
14 could be selected to distribute that money. That's something
15 that A.B. Data does?

16 A. I can't foresee the future who will be appointed to
17 administer the case, so I can't comment on that.

18 Q. Right, but A.B. Data has already done some of that because
19 they sent out the notices, right?

20 A. Yeah, they sent out the first notice, but it does not mean
21 in any way, shape, or form that the court will appoint A.B.
22 Data to do the next step.

23 Q. Okay. But A.B. Data would want that work, right?

24 A. I no longer work there, but I would hope so.

25 Q. Yeah, when you worked there and you had this role, you

1 wanted to get that work, right?

2 A. Yes.

3 Q. Okay. And that's called fund distribution, if something is
4 going out to the class, and that's something that you're an
5 expert in, right?

6 A. That's correct.

7 Q. And is the amount that gets paid to A.B. Data for fund
8 distribution related at all to how much gets awarded?

9 A. No.

10 Q. It's a set amount no matter how many people are involved?

11 A. We get paid for postage. We get reimbursed for print and
12 mail costs, and then we charge for a call center -- well, not
13 we anymore. The claims administrator and fund distributor gets
14 charged for the actual hours that they spent working, but it's
15 not a percentage. It's not a set cost. It's just
16 reimbursement of expenses and hours.

17 Q. But they make money on it, right? They don't do it just
18 for the cost of doing business?

19 A. Correct, it's not a non-profit organization. It is a
20 business.

21 Q. Okay. So it's in A.B. Data Class Action Administration's
22 interest for there to be money to distribute to a class because
23 they can get hired for that work, right?

24 A. Possibly.

25 Q. Okay. And you mentioned to Mr. Barrett that you do work

1 for law firms, and you've done other work for Mr. Barrett's law
2 firm, right?

3 A. That's correct.

4 Q. And when you do work for private law firms, that's
5 primarily for private law firms representing the plaintiffs,
6 right?

7 A. Well, if you take overall the percentage of cases who is
8 our primary contact, about 70 percent of cases is plaintiffs
9 who is our primary contact. About 30 to 40 percent is
10 defendants, but we don't work neither for plaintiffs nor for
11 defendants. All claims administrators are appointed and fund
12 distributors are appointed by courts to do that work, and
13 that's who we work for.

14 Q. Okay. So I'm not talking about when there's a settlement,
15 and you're doing that. I'm saying -- actually, I'm sorry I
16 wasn't clear. When you're testifying as an expert and doing
17 what you do here, which is giving an expert opinion in a case,
18 your work is primarily for plaintiff law firms, right?

19 A. That's correct.

20 Q. And am I correct that generally you offer opinions to
21 support class certification?

22 A. That's correct.

23 Q. And you generally offer opinions to say that a class should
24 win in some respect, right?

25 A. My opinions are related to data analysis, and I don't

1 express any opinions of who should win.

2 Q. But they're all on the plaintiff side, right?

3 A. That's correct.

4 Q. And you've never offered an expert opinion in any court or
5 any litigation for the defense, have you?

6 A. Not on the data analysis, no.

7 Q. And so we talked a bit -- you talked a bit about -- or we
8 both talked about the fact your role in this case, you said,
9 was to analyze telephone records, right?

10 A. That's correct.

11 Q. Okay. And can you tell us when you first did that work?

12 A. It was a couple of years ago.

13 Q. Okay. And so you have your report -- do you still have
14 your report there?

15 A. Yes, I do.

16 Q. What's the date of your report?

17 A. The date of my report I believe is January last year, but
18 may I --

19 Q. Yeah, sure. Look at it. I think it's January 30, 2015.
20 Does that sound right to you?

21 A. It does, but let me just take a quick look.

22 **THE COURT:** I keep forgetting it's 2017, too.

23 **THE WITNESS:** That is correct. It's January 30th,
24 2015.

25 **BY MS. ECHTMAN:**

1 Q. Okay. And so you did your work after the complaint was
2 filed in this case, right?

3 A. Correct.

4 Q. So the complaint was filed at some point in 2014, and so
5 Dr. Krakauer didn't have your work when the complaint was
6 filed, he did?

7 A. No.

8 Q. And the numbers in your report, we talked about, are a
9 little bit bigger than the numbers that we're talking about
10 today in terms of the number of telephone numbers and how many
11 phone calls, right?

12 A. That's correct.

13 Q. That's because afterwards Plaintiff agreed to remove some,
14 right?

15 A. That's correct.

16 Q. So the specific numbers we're talking about in court today,
17 those are pretty recent. I think those are actually from a
18 stipulation in 2017 that your lawyer showed you, and you talked
19 about?

20 A. That's correct.

21 Q. Okay. So one of the things that Plaintiff's counsel asked
22 you to do was to check whether certain telephone numbers are on
23 the National Do Not Call Registry, right?

24 A. That's correct.

25 Q. Well, that's one of the things that you did, right?

1 A. Yes.

2 Q. Okay. And you said you specifically wanted to know whether
3 they were on the registry for 30 days at the time they were
4 called; is that right?

5 A. That's correct.

6 Q. And the calls in this case -- you've got call records from
7 May 1, 2010, to August 1, 2011?

8 A. That's correct.

9 Q. And you used a company that -- you said Nexxa. You used a
10 company called Nexxa to give you the information?

11 A. That's correct.

12 Q. And you asked Nexxa -- you said you used Nexxa because they
13 can give you historical information?

14 A. That's correct.

15 Q. And you asked Nexxa to let you know whether the telephone
16 numbers were on the National Do Not Call Registry as of
17 April 1, 2010; is that right?

18 A. That's correct.

19 Q. And you picked that date because it's how many days before
20 the first telephone call?

21 A. 30 days.

22 Q. But none of the -- so you checked for April 1, 2010, right?

23 A. I have to look at my report. I don't recall whether the 30
24 days was April 1, how many days were in April that year, but I
25 believe so.

1 Q. Okay. Do we have the same number of days in April every
2 year?

3 A. I just want to make sure.

4 Q. Okay. Go ahead and look at your report. I'll try and help
5 you out. Go to page 9. I think that might help.

6 A. Yes, April 1st. Thank you.

7 Q. All right. And I think you -- I'm going to open up your
8 report, too, and you said that you found that 23,625 unique
9 telephone numbers were listed on the National Do Not Call
10 Registry as of April 1, 2010. That's what you did, right?

11 A. That's correct.

12 Q. And -- but the telephone calls were actually made after
13 that date, right?

14 A. That's correct.

15 Q. And isn't the standard that they have to still be on the
16 Registry at the time that they were called?

17 A. Yes.

18 Q. But you didn't get a report from Nexxa for each of the
19 dates that the telephone calls were made, did you?

20 A. It was not necessary.

21 Q. Well, you know that telephone numbers can come off the
22 Registry, right?

23 A. Yes.

24 Q. And, in fact, do you know the ways in which telephone
25 numbers come off the Registry?

1 A. If telephone numbers do come off the Registry, Nexxa would
2 mark that in the data set that they provide us usually.
3 Therefore, that was not something that we worried about because
4 there were no indication that any of the numbers listed in my
5 report came off the do not -- National Do Not Call Registry.

6 Q. All right. So did you say that? We're on page 9 of your
7 report, and I think your report says that it was found that
8 these were listed on the NDNCR as of April 1, 2010. Do you see
9 that?

10 A. Yeah, that's correct. They were.

11 Q. And you didn't say "and thereafter"?

12 A. No, I did not.

13 Q. All right. But you believe that if it had come off, Nexxa
14 would have told you that?

15 A. Yes.

16 Q. Okay. And did you check for that?

17 A. That was -- they would -- that would have been identified
18 in my report if they would have -- if the phone numbers would
19 have come off. I personally did not check every single number,
20 but the report that I received from Nexxa did not specify that
21 any of these numbers came off the Registry.

22 Q. But you -- you just said, I think, you didn't check?

23 A. I did not personally go back to National Do Not Call
24 Registry and check it personally, no, I did not.

25 Q. Okay. And you didn't get a report from Nexxa for the last

1 day in the class period to make sure you had the numbers on day
2 one and the last day, which would be August 1, 2011?

3 A. I could not justify that expense because it was not
4 necessary.

5 Q. And so how -- how would Nexxa tell you in the report that
6 something came off?

7 A. Since there were no indication on that particular report
8 and there was no field that was filled out that any of those
9 records came off, so it would have been in their original
10 output.

11 Q. And what field is that?

12 A. There was no field that was included for that. That would
13 have been in the e-mail that they would have sent me.

14 Q. Oh, so it's not actually in their report? You're saying
15 they would have told you in a separate e-mail?

16 A. Well, since there was no phone numbers that Nexxa ever
17 indicated that came off National Do Not Call Registry, based on
18 Nexxa's records, there was no special field that was included
19 in the Nexxa output; but they would have informed me if there
20 would be by e-mail or a phone call, or they would have added a
21 field in the report.

22 Q. Did you -- did you produce in this case an e-mail from
23 Nexxa that might say that?

24 A. No, since there were no numbers that came off the report,
25 there was no e-mail stating that.

1 Q. All right. Well, but I think you'll agree, numbers can
2 come off, right?

3 A. Oh, yeah, absolutely.

4 Q. And you're saying now that Nexxa would have told you if
5 they did?

6 A. Correct.

7 Q. But if Nexxa -- let's just assume that Nexxa didn't
8 actually give you any of that information and didn't check
9 that, okay. How do numbers come off?

10 **THE COURT:** What do you mean let's assume that? Is
11 your question dependent on that, how the numbers come off? I
12 don't understand what you're asking. I'm sorry.

13 **MS. ECHTMAN:** I'm asking -- I'm asking the witness --
14 I want to talk about how numbers come off.

15 **THE COURT:** Okay. Go ahead.

16 **THE WITNESS:** Well, as far as I know, the process is
17 not ideal. Usually, based on my understanding, which was not
18 really included in my opinion in this case, but based on my
19 understanding, if the numbers are reassigned to a different
20 person, the numbers come off National Do Not Call Registry.

21 If an individual wants to take a phone number of National
22 Do Not Call Registry who registered before, I actually don't
23 know how they would take it off.

24 Q. Okay. So just some background on the National Do Not Call
25 Registry. That's administered by the Federal Trade Commission,

1 right?

2 A. That's correct.

3 Q. And the Federal Trade Commission has some subcontractors it
4 hires to do that work, right?

5 A. That's correct.

6 Q. Okay. Do you know one of them is Lockheed Martin?

7 A. Yes.

8 Q. And another one is PossibleNOW, right?

9 A. That's correct.

10 Q. And you know PossibleNOW is the one responsible for
11 determining if a number has been disconnected and reassigned,
12 it should come off the Registry, right?

13 A. One of them, yes.

14 Q. Okay. And you know that people can take their phone
15 numbers off the Registry by calling an 800 number from the
16 telephone number that they want to take off. Does that sound
17 familiar to you?

18 A. It does. I just don't know where that telephone number is
19 to be found.

20 Q. Oh, you -- have you ever looked for it on the FTC's
21 website?

22 A. It's not that easy to find. Yes, I have.

23 Q. Oh. Okay. I found it.

24 A. Okay.

25 **THE COURT:** All right. Well, the lawyers don't

1 testify, so the jury will disregard that.

2 **BY MS. ECHTMAN:**

3 Q. All right. Well -- okay. And have you also heard that at
4 times telephone numbers have mistakenly come off the Registry?

5 A. Yes, the Registry is not ideal.

6 Q. Right. And, in fact, there was a time in 2008 where
7 PossibleNOW made a mistake, and about 225,000 numbers came off
8 the Registry that shouldn't have?

9 A. I'm not aware of that.

10 Q. Okay. And so you don't know if anything like that would
11 have happened in the class time period that Nexxa wouldn't have
12 known about?

13 A. My job was to rely on Federal Trade Commission's National
14 Do Not Call Registry and the information on that registry. I
15 have no comment or opinion how that registry is maintained and
16 what mistakes, if any, might have occurred on the Registry
17 beyond my control.

18 Q. Okay. And we talked about the fact that your former
19 company, A.B. Data Class Action Administration, was in charge
20 of giving notice to the class -- the potential class in this
21 case, right?

22 A. That's correct.

23 Q. And they did that by sending out postcards to people in the
24 mail?

25 A. That's correct.

1 Q. Okay. And are there some people who wrote back and said --

2 **THE COURT:** Sustained.

3 **BY MS. ECHTMAN:**

4 Q. Did you ever learn through any of the information that A.B.
5 Data got back that some people claimed they were not on the
6 registry?

7 **MR. BARRETT:** Objection, Your Honor.

8 **THE COURT:** Well, overruled. She can answer that.

9 **THE WITNESS:** I don't recall.

10 **MS. ECHTMAN:** Your Honor, may I show the witness
11 something to refresh her recollection?

12 **THE COURT:** You may.

13 **MS. ECHTMAN:** We have DX78.

14 **MR. BARRETT:** Your Honor, objection with respect to
15 this. May we approach?

16 **THE COURT:** Ladies and gentlemen, let me excuse you
17 briefly to the jury room.

18 (The jury left the courtroom.)

19 **THE COURT:** Okay. Defendant's 78?

20 **MS. ECHTMAN:** Yes. So, Your Honor, if you want more
21 information from me, I'll --

22 **THE COURT:** I'm just looking at the exhibit.

23 (Pause in the proceedings.)

24 Are there others?

25 **MS. ECHTMAN:** I want to use this one. I mean, the

1 first two go directly to whether it's accurate, because she got
2 notice from two people at a time that they were in the punitive
3 class.

4 **THE COURT:** Okay. Just a second. Oh, I see the
5 second page is an e-mail.

6 **MS. ECHTMAN:** It's an e-mail that says -- I just want
7 to look at the first two pages for this question, which is --
8 the first three pages for -- I'm sorry -- up to page 5 for
9 purpose of this question to talk about people who wrote back
10 and said they weren't on the registry.

11 **THE COURT:** So, okay, the handwritten one there on
12 page 1.

13 **MS. ECHTMAN:** And then on page 5, there's an e-mail.

14 **THE COURT:** Okay. And your objection?

15 **MR. BARRETT:** These are opt-out notices, Your Honor.
16 These people are not class members and requested to be
17 excluded. It has no bearing on issues in this case,
18 misleading.

19 **MS. ECHTMAN:** Well, it's actually -- they were
20 admissions by party opponents until the opt-outs were
21 processed.

22 **MR. BARRETT:** They're not parties.

23 **MS. ECHTMAN:** And I'm asking her about what she knew,
24 which goes to the reliability of her work.

25 **THE COURT:** Okay. Well, the first one, the

1 handwritten one, is ambiguous, it looks to me. Now, the e-mail
2 is not ambiguous on page 5, but that's the only one -- these
3 are the only two, rather, that you're saying --

4 **MS. ECHTMAN:** Well, there are other ones -- two others
5 that say no one ever called me. I'm not going to get into
6 those right now.

7 **THE COURT:** Well, right, we're not going to get into
8 that.

9 **MR. BARRETT:** Additionally, Your Honor, this is
10 hearsay. This is --

11 **THE COURT:** All right. I'm going to exclude this
12 under Rule 403. It's just -- it's just a couple, it seems to
13 me, to have the potential to take us down a -- take us down a
14 rabbit hole.

15 **MS. ECHTMAN:** Well, Your Honor, it's our position
16 those are the only --

17 **THE COURT:** Did I just rule?

18 **MS. ECHTMAN:** Yes.

19 **THE COURT:** All right. Bring the jury back in,
20 please.

21 (The jury entered the courtroom.)

22 **THE COURT:** All right. Ms. Echtman, you may continue.

23 **BY MS. ECHTMAN:**

24 Q. All right. So, Ms. Verkhovskaya, just to go back, we've
25 talked about that you used this company, a vendor called Nexxa,

1 to get the information about the national registry, right?

2 A. Yes.

3 Q. And am I right that Nexxa has made mistakes plenty of
4 times?

5 A. I'm not sure. I don't have an opinion on that.

6 Q. Okay. Do you recall being asked at deposition whether
7 Nexxa ever got anything wrong and you said, "I'm sure there
8 were plenty of times"?

9 A. Well, I'm sure there were, but I can't comment generally on
10 that at this time. I don't recall specific examples.

11 Q. And you've never tested the reliability of Nexxa's output
12 to you, have you?

13 A. We never felt it was necessary.

14 Q. And so you just didn't do it?

15 A. Since it is a fair standard used by the entire industry, we
16 did not feel that it was making any business sense to spend
17 time and resources testing the reliability of appropriate and
18 accepted-by-the-whole-industry data.

19 Q. Okay. So let's -- let's move on a little bit and talk
20 about this residential question. You talked about the fact
21 that you reviewed the Five9 call records, and those are SSN's
22 call records, and sometimes those call records identified that
23 they got a business, right?

24 A. Correct.

25 Q. And does that show up in a data field called disposition?

1 A. Correct.

2 Q. And in your experience in looking at call records, is it
3 your understanding that sometimes that disposition column is
4 entered by the call center representative?

5 A. Sometimes, but could you please maybe show me what exactly
6 you're referring to? Can you show me the dataset?

7 Q. Well, I'm just asking you -- you said you relied on this
8 data field, and you relied on a data field that said business.

9 A. That's correct.

10 Q. And that was the disposition field, right?

11 A. As far as I recall, yes.

12 Q. And you've looked at a lot of telephone records over the
13 years, right?

14 A. That's correct.

15 Q. And a lot of them have a disposition field?

16 A. Well, some have dozens or hundreds of disposition fields?

17 Q. Okay. So how many disposition fields were there in the
18 Five9 records?

19 A. Well, we -- in the field of data analysis, we call
20 disposition codes -- it's every field that is identified a
21 different disposition. It could be one or two or three. There
22 were several files that were produced, and not all files were
23 in the same format. So if you would like me to comment on the
24 source data and how many fields were in each file of the source
25 data, I would like to take a look at it to affirmatively

1 confirm how many disposition fields were in each dataset.

2 Q. Okay. So but just sitting here right now, you can't tell
3 me whether there was only one field in each of the sets labeled
4 "disposition"?

5 A. There was at least one.

6 Q. And you said that some of them were in different formats,
7 but do you know whether they had the same fields; they just
8 might have appeared in a different order?

9 A. I believe some files had less fields and some files
10 appeared in a different order and some files or two had
11 completely different structure and contained completely
12 different data. So the source data was very different from the
13 format of the data in my report.

14 Q. All right. But will you agree with me that generally when
15 you've got call records and you've got a call center, that
16 there's a field that talks about or addresses what might have
17 happened on a call? Like you talked about fields that you used
18 to decide that they weren't connected, right? You said no
19 answer, busy. I'm talking about that field.

20 **THE COURT:** I'm sorry.

21 **BY MS. ECHTMAN:**

22 Q. Does that help?

23 **THE COURT:** I didn't follow the question. I
24 apologize.

25 **MS. ECHTMAN:** I'm sorry.

1 **BY MS. ECHTMAN:**

2 Q. But specifically for the business field, do you know how
3 that information got into the call records?

4 A. In Five9?

5 Q. In Five9, where you saw something that said it was a
6 business.

7 A. I do not know how the information got into the call
8 records. That was not included in my opinion.

9 Q. But sometimes information gets into the call records
10 because a call center representative types it in; is that
11 right?

12 A. It is a possibility.

13 Q. They could type it in, or they could use a drop-down and
14 say business?

15 A. It is a possibility.

16 Q. And do you know Five9 or how SSN would know that it was a
17 business?

18 A. That was not included in my opinion. In my opinion, I felt
19 it would be fair to DISH, regardless of how that information
20 got into the records, to give them the benefit of the doubt and
21 exclude those telephone numbers.

22 Q. And so when you looked through the call records, you
23 specifically found 1,275 telephone numbers in SSN's call
24 records that were identified as business; is that right?

25 A. That's wrong.

1 Q. Okay. Well, let's look at -- can we pull up Plaintiff's
2 demonstrative 2008? So let's just talk about where you are in
3 your funnel or sieve. We're down towards the bottom where you
4 took out the business numbers. So you had already just looked
5 at which calls you thought connected, and you whittled it down,
6 right?

7 A. Correct.

8 Q. And then you looked for how many calls were single calls
9 and you whittled it down?

10 A. Correct.

11 Q. And then you looked at how many numbers were not on your
12 report from Nexxa about DNC numbers, right? Less 34,526
13 non-DNC numbers, right?

14 A. That's correct.

15 Q. And then your next step was to take out 1,393, and you said
16 "business and LexisNexis business numbers."

17 A. That's correct.

18 Q. And you're saying I'm wrong if I think that 1,275 of those
19 came from the SSN records, those business identifiers?

20 A. Your previous question was whether there were about 1,200
21 business telephone numbers identified as such in the Five9
22 records, and that's where you were incorrect, because I only
23 looked for a number of telephone records identified as
24 businesses in Five9 records after I already removed over a
25 million five phone calls. I do not have an opinion and I do

1 not know how many telephone numbers were identified as
2 businesses in the Five9 records in the source altogether.

3 Q. Okay. So until you got to this step where you had already
4 gone down to 23,625 numbers, then you checked for business?

5 A. That is correct.

6 Q. Okay. And at that step, you found 1,275 business numbers?
7 Go ahead. You can take out your report.

8 A. That number is included in the 1,393 number, so I would
9 like to check in my report to make sure we're on the same page.

10 Q. Sure. Go to pages 9 to 10 of your report.

11 (Pause in the proceedings.)

12 A. So that is correct. My report states that we identified
13 1,275 unique telephone numbers as being business identified
14 telephone records.

15 Q. But there could have been more because you didn't check --
16 you only checked those 23,625 phone numbers, right?

17 A. That's right.

18 **THE COURT:** There could have been more?

19 **BY MS. ECHTMAN:**

20 Q. There could have been more business numbers identified in
21 the SSN call records because you only checked the 23,625,
22 right?

23 A. Correct.

24 Q. And you don't know how many more business dispositions for
25 telephone numbers there could have been?

1 A. That is outside of the scope of my opinion.

2 Q. And then after you did that -- right, but let me take a
3 step back. So you said several times already you -- some of
4 the evidence you used was that SSN wanted to call residences
5 because they wanted to sign up residential subscribers for
6 DISH.

7 A. That's correct.

8 Q. Okay. But it looks like just from those phone numbers that
9 you looked at a lot of times they called businesses, 1,275
10 times.

11 A. That's correct.

12 Q. All right. And so after you did that -- so -- but the SSN
13 call records didn't identify every one of those 23,625 numbers
14 as a business, right?

15 **THE COURT:** I'm sorry. What?

16 **BY MS. ECHTMAN:**

17 Q. The SSN call records didn't identify all of the businesses
18 within those 23,625 numbers, right?

19 A. I'm not sure I'm following you.

20 Q. All right. Well, you did another step to find business
21 numbers, right?

22 A. That's correct.

23 Q. That's when you went and you got a report from LexisNexis,
24 right?

25 A. That's correct.

1 Q. And LexisNexis gave you back this report and you found
2 another 118 business numbers in that report from LexisNexis?

3 A. That's correct.

4 Q. And so then you removed those?

5 A. That's correct.

6 Q. So that's how we get to the 1,393 number that's on this
7 funnel?

8 A. That's correct.

9 Q. Am I right that you described the file -- the report you
10 got back from LexisNexis as an output regarding a business
11 telephone number append? Is that an accurate way to describe
12 it?

13 **THE COURT:** Could you just say that again? I didn't
14 understand the last word.

15 **BY MS. ECHTMAN:**

16 Q. An output regarding a business telephone number append?

17 A. We don't refer to it that way. Sometimes we talk about
18 telephone type identification append, but I suppose you can
19 refer to it that way as well.

20 Q. Okay. So because I thought you said at your deposition
21 that -- when you were asked what the document was this is an
22 output from LexisNexis regarding business telephone number
23 append.

24 A. I described it that way.

25 Q. Okay. And I think that you -- you said yesterday when

1 you -- for those 118 numbers that you say are business, you
2 included numbers that might be government, right?

3 A. That's correct.

4 Q. Okay. And you talked about there were three columns in the
5 LexisNexis data. There's one that says "listing type bus,"
6 B-U-S. And that's business, right?

7 A. That's correct.

8 Q. And that's a column where LexisNexis has some evidence that
9 it's a business number, right?

10 A. That's correct.

11 Q. And they fill in that column. And then there's another one
12 that says "listing type gov," G-O-V, right?

13 A. That's correct.

14 Q. And you're saying that LexisNexis fills out that column
15 when they have some evidence that it's a business number?

16 A. That's correct.

17 **THE COURT:** Government?

18 **THE WITNESS:** Government.

19 **BY MS. ECHTMAN:**

20 Q. I'm sorry. Government number. And then the third type is
21 "listing type," R-E-S, "res," right?

22 A. Correct.

23 Q. And it's your testimony that LexisNexis fills that out when
24 they have some evidence that it's a residential number?

25 A. That's correct.

1 Q. And so I think you testified that -- so you looked at the
2 government column and you removed government numbers?

3 A. Yes.

4 Q. Are you sure you did that?

5 A. Yes.

6 Q. Okay. Do you recall testifying at your deposition that you
7 didn't look at that field for your work in this case?

8 A. There were -- there is a possibility. I did not remember
9 that at that time. I actually remember that at the time of my
10 deposition I could not recall if there were any government
11 numbers, but as I was reviewing the output and my report for
12 this trial, I came across a few, so I was mistaken.

13 Q. Okay. So when your deposition was taken and you testified
14 under oath and you said that you didn't look at that field, you
15 were mistaken?

16 A. Yes.

17 Q. But I thought -- I'm a bit confused because I thought you
18 said this is the standard way you do it. Right? How -- you do
19 this in a lot of cases, this type of work?

20 A. Yes, we do.

21 Q. Okay. And so how many years had you been doing this type
22 of work when your deposition was taken?

23 A. 20.

24 Q. And you're talking about there's a standard way to do it,
25 right?

1 A. Yes.

2 Q. And you use this LexisNexis data a lot?

3 A. Yes.

4 Q. Okay. But when -- when DISH's lawyer took your deposition,
5 you forgot that you looked at that column?

6 A. Yes.

7 Q. Okay. And, you know, we talked a little bit about a
8 stipulation where DISH and the Plaintiff agreed that the
9 Plaintiff would remove some calls from this case. And you
10 reviewed that?

11 A. Yes.

12 Q. Okay. And do you recall that that particular stipulation
13 said that there were call -- that there were phone numbers
14 identified as government in the LexisNexis report that hadn't
15 been removed?

16 A. Can you please refresh my recollection and show that to me?
17 I would appreciate that.

18 Q. Sure. Happy to do that.

19 (Document handed to the witness by Ms. Echtman.)

20 (Pause in the proceedings.)

21 **BY MS. ECHTMAN:**

22 Q. Okay. So this is the third stipulation regarding the class
23 definition. If you would just turn to page 4 and look at --
24 there's a column there where it says exhibit number, name of
25 exhibit, number of calls.

1 A. Yes.

2 Q. And that's 31E. Do you see where it says phone numbers or
3 line type designation is business or government at least once
4 in the LexisNexis data, and there's a number of telephone
5 numbers and phone calls in the next column, right?

6 A. Yep.

7 Q. And so --

8 **MS. ECHTMAN:** Can we show this on the screen, Your
9 Honor, just that top column there?

10 **THE COURT:** Okay.

11 **MS. ECHTMAN:** Just the top one. Can we zoom in?
12 Okay.

13 **THE COURT:** You can't? Okay. Well, you can take the
14 screen down. Maybe you can use the ELMO, if you want. Just
15 fold it back.

16 **MS. ECHTMAN:** All right. I'll -- is this on? I
17 cannot see it. I'm sorry.

18 **BY MS. ECHTMAN:**

19 Q. Okay. So here we have a column and this is in the
20 stipulation between the Plaintiff and DISH. And you remember
21 that in this stipulation we took out phone numbers and calls
22 that you had included in your report, right?

23 A. Yes.

24 Q. Okay. And so here this category is phone numbers where the
25 line type designation is business or government, at least once

1 in the LexisNexis data, and they didn't come out and there
2 were -- it shows there were another 115 numbers and 302 calls.

3 A. I see that.

4 Q. But you're still sure that you took out all the business
5 numbers -- all the government numbers?

6 A. We looked at the field and the column, and when analyzing
7 1.6 or -- I don't exactly recall the total number of calls
8 analyzed. We made a few small omissions in a variety of
9 categories that did not affect my opinion. We removed
10 government telephone numbers, but -- and business telephone
11 numbers, but it appears we missed 115.

12 Q. And so let me just talk about -- you said 1.6 million call
13 records, but I think if we go back -- if we can put up your
14 funnel, you said you checked 23,625 numbers to see if they were
15 business, right?

16 A. Correct.

17 Q. And so -- and you got a big Excel back from LexisNexis,
18 right?

19 A. That's correct.

20 Q. And so when you -- when you review that, nobody is
21 reviewing that visually, are they?

22 A. No, they're not.

23 Q. Right. Someone is going to write code. You talked about
24 people writing code.

25 A. That's correct.

1 Q. And the code is supposed to check every field that you're
2 interested in, right?

3 A. That's correct.

4 Q. Okay. And so then the code shouldn't really miss anything,
5 should it?

6 A. Well, it depends. Sometimes we receive data in Excel
7 spreadsheet. So ideally we don't want the code to miss
8 anything, but, as I testified earlier -- yesterday, that my job
9 was not to produce a hundred percent accuracy and not to verify
10 every single number. My job was to produce an opinion based on
11 solid methodology and show sort of a big-picture result.

12 You're correct we missed a few numbers, and sometimes the
13 code can miss a few numbers here and there, but those rounding
14 issues do not change my opinion in any way, shape or form.

15 Q. Okay. So let me just go back a minute to what we just
16 talked about. You found originally 118 business identified
17 numbers in LexisNexis, right?

18 A. That's correct.

19 Q. Okay. And your -- I think we know now you missed 115.

20 A. Yes.

21 Q. Okay. So that's a hundred percent more. Am I right? Is
22 that a hundred percent more?

23 A. Well, it depends how you present the number. We removed
24 1,393 records altogether that were identified as business. So
25 if you look at it from a big picture, it's about 10 percent.

1 If you look at it from a different perspective, it's about a
2 hundred percent. It depends how you calculate your numbers.

3 Q. Right. So if you calculate the number based on how many
4 you found in the LexisNexis data, you found 118, and you didn't
5 find about close to the same number. That's -- that's about a
6 hundred percent.

7 A. If you look at it that way, sure.

8 Q. Okay. So now if we just go back for a second -- so after
9 you removed these 1,903 -- 1,393 business numbers, you were
10 left with 22,232 numbers, right?

11 A. That's correct.

12 Q. And those are all the numbers that you did not specifically
13 identify as business?

14 A. That is correct.

15 Q. And am I right that LexisNexis never guaranteed or
16 warranted to you that it could locate all business numbers for
17 you in the report it gave to you?

18 A. As I stated earlier, we're producing a methodology based on
19 industry acceptable standards. Those standards are never a
20 hundred percent.

21 Q. So LexisNexis -- you don't have any document from
22 LexisNexis that says we can get you just about every business
23 number, do you?

24 A. I'm sorry. Your question is very ambiguous. I don't
25 understand "just about." Is it just about 50 percent, 1,600?

1 Could you rephrase?

2 Q. Right. Well, I think you're going on an assumption here
3 that if you didn't have affirmative evidence from LexisNexis
4 that it was a business number, you're saying then it's a
5 residential number, right?

6 A. That's correct.

7 Q. And the premise of that is you think LexisNexis can
8 identify just about every business number; is that right?

9 A. I think that LexisNexis utilizes sources that identify the
10 majority of business numbers. That's correct.

11 Q. Oh, just the majority?

12 A. Well, they work with the State Departments, various
13 databases where businesses have to be registered. I think I
14 described those databases before. The Secretary of State
15 websites, yellow pages, white pages, the directories where the
16 businesses are listed, I think that it is common sense. And,
17 in addition, it is my experience and expertise over the years
18 that LexisNexis identifies just about all the businesses in
19 their data.

20 Q. Do you have any document from LexisNexis that says that?

21 A. We have a document, we have marketing material from
22 LexisNexis that might refer that they offer a product that
23 identifies telephone numbers as businesses.

24 Q. And you said LexisNexis doesn't do that unless they have an
25 affirmative piece of evidence to let them do it; right?

1 A. That's correct.

2 Q. Okay. And they don't say to you that they have an
3 affirmative piece of evidence for every single -- just about
4 all the business telephone numbers that are out there in the
5 United States; do they?

6 A. Once again, I don't know what you mean by just about, but
7 based on my interpretation of your meaning of just about, I
8 think they do.

9 Q. All right. So, if we look at your funnel, I think you've
10 said that it's your opinion that all of the 20,450 numbers at
11 the bottom of your demonstrative are residential?

12 A. It is my opinion that they are more likely or not
13 residential.

14 Q. And that's based on the fact that LexisNexis didn't tell
15 you that they were business numbers?

16 A. Or government, that's correct.

17 Q. Okay. And, am I right that, actually, you didn't get any
18 information back from LexisNexis for some of the numbers
19 included in that 20,000?

20 A. That's correct.

21 Q. Okay. And so, those are more phone numbers that Plaintiff
22 agreed to take out of the case; right?

23 A. That's correct.

24 Q. Because you hadn't actually checked LexisNexis for those
25 phone numbers?

1 A. In time for my report, no, I did not.

2 Q. All right. So you didn't -- they weren't included in the
3 report you got from LexisNexis?

4 A. That's correct.

5 Q. And that was more than 1,000 telephone numbers?

6 A. That's correct.

7 Q. All right. So I'd like to turn to -- in your report --
8 you've given testimony in a lot of cases in federal court;
9 right?

10 A. Correct.

11 Q. And, in connection with that, you issue a report; right?

12 A. Correct.

13 Q. Okay. And, am I right, the purpose of the report is to let
14 the other side know what opinions you're going to offer?

15 A. Correct.

16 Q. Right. And so, that report is supposed to contain a
17 complete statement of all of the opinions that you're going to
18 give and the basis for those opinions; right?

19 A. Correct.

20 Q. Okay. And you did that? You've got a big report there;
21 right?

22 A. That's correct.

23 Q. Okay. And, in your report, did you give a summary of what
24 you found in your analysis? Do you recall whether in your
25 report you gave a summary?

1 A. Yes.

2 **THE COURT:** Excuse me. Before you get into that,
3 would this be a good place for the morning break?

4 **MS. ECHTMAN:** Sure.

5 **THE COURT:** Or do you have a couple more questions
6 that would take us to a better stopping point?

7 **MS. ECHTMAN:** I just have -- just a few more questions
8 on that.

9 **THE COURT:** All right. Go ahead.

10 **BY MS. ECHTMAN:**

11 Q. Okay. And so, in your summary, you generally try to say,
12 like, this is a summary of what my opinions are going to be;
13 right?

14 A. That's correct.

15 Q. Okay. And so, you gave a summary here, right? And I'll
16 direct you to page 10 of your report. And, in fact, your
17 summary says -- and so, it's your opinion here that you've said
18 a few times that you've got an opinion to a reasonable degree
19 of certainty that all these 20,450 numbers are residential;
20 right? That's what you've testified.

21 A. Well, my opinion includes a little more information than
22 that, but --

23 Q. Okay.

24 A. -- that is included in my opinion.

25 Q. That's your ultimate opinion right now on the stand?

1 A. That's part of my opinion, yes.

2 Q. Okay. But your summary doesn't say that; does it?

3 (Pause in the proceedings.)

4 A. Yes, it does.

5 Q. Can you show me where it says that? I'm looking on pages
6 10 to 11. Show me in your summary where it says that you've
7 got an opinion to a reasonable degree of certainty that these
8 are residential numbers.

9 A. Well, I state that they were not identified as businesses.

10 Q. Okay. Did you state anywhere in this summary that the fact
11 that you didn't affirmatively identify them as business leads
12 you to believe that they're residential?

13 A. Well, it's throughout my report. It is assumed.

14 Q. It's assumed?

15 A. Well, to me, it is clear that if they're not businesses,
16 that they're residential.

17 Q. But does it say that in your report?

18 **THE COURT:** Are you asking now about the whole entire
19 report or the summary?

20 **MS. ECHTMAN:** We can take a break and she can check
21 her report. This might be a good time for the break so she can
22 show us where it says that.

23 **THE WITNESS:** Well, then, I'm not going to have a
24 break.

25 **THE COURT:** Well, if you can answer the question, go

1 ahead.

2 **BY MS. ECHTMAN:**

3 Q. And your report's thick, but it's not -- most of it's
4 charts, right, of -- of telephone numbers?

5 A. Correct.

6 Q. Right. So not everything in your binder is your report.
7 The actual report is 16 pages of written words.

8 (Pause in the proceedings.)

9 **THE COURT:** Okay. Well, we'll go ahead and take the
10 break so the witness can do -- can look at the report while
11 we're on a recess.

12 So, ladies and gentlemen -- if I can ask the witness to
13 step down. You can take your report with you if you need to.

14 **THE WITNESS:** Okay. Thank you.

15 (The witness left the stand.)

16 **THE COURT:** So I can see all of the jurors. Ladies
17 and gentlemen, I'll ask you to leave your notes in your chair.
18 And, just a reminder, you should not have any contact with the
19 lawyers, parties, or witnesses, so don't speak to any of the
20 witnesses should you see them in the hallways or in the
21 courtrooms during the proceedings. And you do need to keep an
22 open mind about the testimony of all the witnesses until you
23 hear, you know, all of the evidence, as I think I mentioned to
24 you all earlier.

25 Again, don't have any independent investigation, and don't

1 communicate about the case with anyone, including with each
2 other, about the case or about any of the witnesses. And
3 you'll remember all my instructions that I usually give you. I
4 just try to emphasize different parts at different times to be
5 sure everybody remembers.

6 Come back in 15 minutes. That will be 11:20, all right?

7 The jurors are excused. If everyone else will remain seated.

8 (The jury left the courtroom.)

9 **THE COURT:** Okay. Anything we need to take up before
10 we take our break? I would propose to deal with the question
11 about Ms. Taber at the lunch recess.

12 **MR. GLASSER:** Okay.

13 **MS. ECHTMAN:** Your Honor, I just might -- I want to
14 preview that the opinions that the witness gave yesterday and
15 today are actually not set forth in her written report. She
16 just said it's assumed. Well, that's not how an expert
17 discloses their opinions, that you need to assume her opinion
18 is that if it's not a business to a reasonable degree of
19 certainty, it's got to be a residence. It doesn't say that in
20 her report.

21 **THE COURT:** You can talk to the jury about that. I
22 don't -- I mean --

23 **MS. ECHTMAN:** Well, I think it's a basis to strike the
24 opinion.

25 **THE COURT:** Well, we'll let her answer the questions.

1 I don't -- you know, I don't know what -- I don't have the
2 report in front of me, so if somebody wants to hand it up, I'll
3 take a look at it over the break. I don't believe the
4 Plaintiff offered it in evidence. Did you?

5 **MR. BARRETT:** We did not, Your Honor.

6 **THE COURT:** Okay.

7 **MS. ECHTMAN:** Reports don't generally come into
8 evidence, but we're happy to give Your Honor a copy of it.

9 **MR. BARRETT:** If you would like, also, the four-hour
10 deposition that Ms. Verkhovskaya gave in response to DISH's
11 attorney's questioning, we can provide that as well.

12 **THE COURT:** I'll just wait until somebody moves to
13 strike, and you can hand up whatever you think I need at that
14 point.

15 All right. We'll take a 15-minute recess.

16 (A morning recess was taken from 11:07 a.m. until
17 11:22 a.m.)

18 **THE COURT:** Okay. I think we're still waiting on one
19 juror. Just for planning purposes, what's your expectation on
20 how long your cross will continue? I'm not trying to put any
21 pressure. I'm just asking.

22 **MS. ECHTMAN:** I expect I'll be done by lunch at the
23 very latest. I hope.

24 **THE COURT:** All right.

25 **MR. GLASSER:** And I believe we'll be resting, Your

1 Honor. We will have one -- I can do it right now. I want
2 to -- for the evidence for willing and knowing is outside the
3 presence of the jury. We're just going to ask the Court to
4 take judicial notice of the Myerscough summary judgment
5 opinion. And I have a certified copy of it for the Court
6 record. So there's no additional witnesses for that and -- and
7 we'll probably be resting after Ms. Verkhovskaya.

8 **THE COURT:** All right.

9 **MR. BICKS:** Just for the record, Your Honor, this is
10 the first I've heard of the Judge Myerscough's opinion, but
11 that's not going to be evidence in this case.

12 **MR. GLASSER:** No, that's willful and knowing, Your
13 Honor. The stuff you asked me to talk about if you thought we
14 had separate willful and knowing, you asked me to make you
15 aware of it outside the presence of the jury.

16 **MR. BICKS:** My point is, Your Honor, whether it's a
17 jury trial or a bench trial -- if it were a bench trial, it
18 would have to be evidence presented to the Court, not an
19 opinion from another court.

20 **THE COURT:** Okay. Well, I'll let them put it in
21 subject to your objection. And if I have to deal with that
22 down the road, I'll deal with it down the road. I don't know
23 that I need to hear detailed argument from you on that.

24 Okay. Are you anticipating -- well, I know she hasn't
25 finished her cross. Are you anticipating significant redirect?

1 **MR. BARRETT:** Very briefly, Your Honor, just a couple
2 of minutes.

3 **THE COURT:** So you wanted to mark this opinion as
4 Plaintiff's Exhibit --

5 **MR. GLASSER:** Whatever we're up to. Let's go to 2050.

6 **THE COURT:** 2050?

7 **MR. GLASSER:** Yes, ma'am.

8 **MR. BICKS:** And, Your Honor, while you're looking at
9 that, I was told by our team that I should have moved --
10 officially moved in Defendant's Exhibit 16 and --

11 **THE COURT:** Which one is that?

12 **MR. GLASSER:** I don't think we have an objection to
13 that.

14 **THE COURT:** All right. What is it?

15 **MR. BICKS:** I'll check, Your Honor.

16 **MR. GLASSER:** No objection.

17 **THE COURT:** All right. Whatever it is, there's no
18 objection, so it's admitted.

19 **MR. BICKS:** All right.

20 **THE COURT:** Okay. I will make Plaintiff's 2050 part
21 of the record.

22 It is not an exhibit that would go to the jury,
23 Ms. Sanders.

24 It is for the Court's consideration only, and that is
25 subject to the Defendant's objection, which I note for the

1 record, and I'll, you know -- should it become necessary, I'll
2 hear from you on that after a verdict on liability, if you
3 remind me.

4 **MR. GLASSER:** Yes.

5 **MR. BICKS:** And, Your Honor, can I also just note for
6 the record the issue with Juror No. 6 that Your Honor raised?
7 I have read over that transcript and am concerned about it in
8 the sense that the transcript at 182 indicates that there was a
9 conversation between Juror No. 6 and the witness. And what
10 concerned me about that, frankly, Your Honor, was it was
11 probably 15 seconds after you expressly said don't talk to a
12 witness.

13 **THE COURT:** Well, I mean, this happened yesterday. I
14 didn't -- I don't remember the witness saying anything. Now,
15 possibly that happened, but what I remember the juror saying to
16 the witness, "Good afternoon, you're a smart lady," some words
17 to that effect. She was the last juror going out. Obviously,
18 she shouldn't have done that.

19 **MR. BICKS:** Right.

20 **THE COURT:** So that's why I addressed it this morning.

21 **MR. BICKS:** Right.

22 **THE COURT:** I looked around. Everybody -- maybe you
23 didn't hear it, Mr. Bicks, but clearly everybody heard it, or
24 most people heard it, from what I could see on people's faces.

25 **MR. BICKS:** Actually, those of us sitting over here

1 didn't. We can't -- it's hard to hear from back here and we
2 didn't know about it until I saw it in the transcript last
3 night.

4 **THE COURT:** Well, I looked over there and that was not
5 my impression from people's faces, but -- well, I mean, I've
6 done what I've done about it. If you want me to do something
7 else, you're going to have to move for it. We'll take that up
8 and anything else at lunch.

9 I'm sure we must have all the jurors by now. I don't want
10 to keep them waiting. The clerk can check. If we have them
11 all, you can bring them in.

12 **THE CLERK:** Yes, they're all here.

13 **THE COURT:** All right. They can come on in.

14 (The jury entered the courtroom.)

15 **THE COURT:** And the witness can come back up to the
16 witness stand.

17 (The witness returned to the witness stand.)

18 **THE COURT:** All right. I believe there was a question
19 pending when we took the break and the witness was examining
20 her report. Did you want to repeat your question, just to get
21 us back on track, Ms. Echtman?

22 **BY MS. ECHTMAN:**

23 Q. Sure. Before we broke, the question was: Can you show us
24 anywhere in the 16 pages of the text of your report that you
25 say that it's your opinion, to a reasonable degree of

1 certainty, that all of these 20,450 telephone numbers are
2 residential numbers?

3 A. Those are not the verbiage that I used, but it is my
4 opinion then and it is my opinion now, since it cannot be
5 anything else, that's what it states, that's what it means.

6 Q. Does it say anywhere in your report that it's not
7 identified as business, it cannot be anything but residential?

8 A. Those words are not part of my opinion, but, as I stated
9 earlier and am stating it now, it is my opinion that's what it
10 means.

11 Q. Could we bring up page 10 to 11 of the report so we can
12 just look at what you actually said?

13 A. Sure.

14 Q. Page 10, bottom of page 10 to the middle -- let's start at
15 the bottom of page 10. You say: "In summary, my analysis of
16 the source data reveals that 20,450 unique," and then if we go
17 to page 11, the top -- go further down -- "numbers were on the
18 NDNCR as of April 1, 2010, at least 30 days prior to any
19 connected calls." That's part of your opinion, right?

20 A. Correct.

21 Q. And that's express, right? It says "received more than one
22 connected call in any 12-month period." Do you see that?

23 A. Yes, I do.

24 Q. Okay. And it says "were not identified as business
25 telephone numbers."

1 A. Correct.

2 Q. "And did not receive a connected call dispositioned to a
3 DISH customer, based on the information from the source data."
4 Right?

5 A. Correct.

6 Q. And then you give a chart and your chart shows, you
7 know -- part of your file is shown in this chart.

8 A. Correct.

9 Q. And you didn't say anywhere in here that you have an
10 affirmative opinion that these numbers, to a reasonable degree
11 of certainty, are residential.

12 A. Well, the way I read it, I state that they're
13 nonbusinesses; and in my expert opinion, it cannot be anything
14 else but residential.

15 Q. Is that -- your report doesn't say that anywhere in your
16 expert opinion; that if it's not business, it has to be
17 residential.

18 A. As I stated earlier, I did not use those words.

19 Q. Did you use anything similar to those words to state that
20 general idea?

21 A. Yes, they are nonbusinesses.

22 Q. So just by saying they are nonbusinesses you were
23 meaning --

24 A. It cannot be anything else. So I use a negative to show a
25 positive. It is an approach that I used in my report.

1 Q. All right. So you'll agree with me that you just used the
2 negative?

3 A. Correct.

4 Q. All right. And you don't say anywhere in your report that
5 the LexisNexis data that you used can identify -- is complete
6 in its ability to identify business numbers.

7 A. Well, I state in my report that LexisNexis -- I don't --
8 let me read it to you, what I say about LexisNexis.

9 (Pause in the proceedings.)

10 A. "In cases brought under the Telephone Consumer Protection
11 Act, TCPA" --

12 Q. I'm sorry. Can you tell me what page you're on?

13 A. Oh, yes, sure. It's page number 3 of my report. "47
14 U.S.C. Section 227, A.B. Data routinely analyzes call records
15 to identify class members. In analyzing the call records, A.B.
16 Data regularly partners with reputable vendors, such as
17 LexisNexis, Experian, Nexxa Group, Nexxa and others,
18 collectively data processors. A.B. Data has longstanding
19 relationship and prior experience with the data processors.
20 The data processors are able to provide information where
21 access to numerous records and data sources. Nexxa provides
22 information from the National Do Not Call Registry, including
23 data registry. Experian provides skip tracing services to
24 identify the most recent address of an individual based upon a
25 combination of name, address, history and/or telephone number.

1 LexisNexis provides information from public and proprietary
2 records, including information regarding whether a particular
3 phone number was associated with a business or residence and
4 telephone number subscriber information."

5 Q. Okay. That's what you said about LexisNexis?

6 A. That's correct.

7 Q. All right. And so we talked a little bit -- you talked a
8 little bit about the reasons why you think LexisNexis can
9 identify a lot of business numbers, right?

10 A. That's correct.

11 Q. Okay. And you said one reason is because businesses have
12 to register with the Secretary of State and they have to
13 provide a telephone number.

14 A. That's correct.

15 Q. And how many telephone numbers does a business have to
16 provide to the Secretary of State?

17 A. At least one.

18 Q. Right. They just have to provide one number where they can
19 be contacted, right?

20 A. That's correct.

21 Q. And will you agree with me that a lot of businesses have
22 many more numbers than just one?

23 A. That's correct.

24 Q. If you take a big company like we've talked about, AT&T,
25 AT&T has -- within that company has a lot of phone numbers,

1 right?

2 A. That's correct.

3 Q. But only one would be with the Secretary of State?

4 A. That's correct.

5 Q. And you said the Secretary of State information is
6 available online; right?

7 A. I don't recall stating that. I stated that LexisNexis
8 utilizes the Secretary of State information as one of many of
9 their sources.

10 Q. And you said that they also use, I think, is it the white
11 pages, like the telephone directories?

12 A. They have literally tens of thousands of sources, and those
13 directories are included in those sources.

14 Q. You don't know what all of their sources are?

15 A. It's a proprietary database, so there is no public listing
16 of their sources.

17 Q. Okay. And you haven't done any testing on the reliability
18 of all of their sources?

19 A. Since I -- nobody knows what they are, they cannot be
20 tested.

21 Q. Okay. So, for any particular data point in LexisNexis, you
22 don't know what their particular source is?

23 A. That's correct.

24 Q. And so, you can't say that it comes necessarily from a
25 reliable source?

1 A. Yes, I can.

2 Q. Even though you don't know what it is?

3 A. That's correct.

4 Q. And you also mentioned business directories; right?

5 A. That's correct.

6 Q. And you said that companies will list their phone numbers

7 in business directories; right?

8 A. Correct.

9 Q. And -- but you wouldn't expect a company to list all of

10 their telephone numbers in a business directory; would you?

11 A. Well, that's why many sources are utilized. And that's why

12 my opinion states that it's more likely than not in the vast

13 majority.

14 Q. You think the vast majority of business numbers are in

15 business directories?

16 A. In various sources are identified as businesses; that's

17 correct.

18 Q. Okay. Well, aren't there some numbers that businesses may

19 have that they don't want to be available to the public, like

20 some phone numbers they don't want anyone to be able to call?

21 A. Look, there are one-offs, and you can have all kinds of odd

22 case scenarios, but those rounding issues don't change my

23 opinion.

24 Q. So there might be major executives who have very high

25 profile jobs, and they might not want the general public to get

1 their direct dial phone number at work to be able to call them?

2 A. How would SSN get that phone number?

3 Q. Well, how did SSN get any of its phone numbers; do you

4 know?

5 A. Based on my review of the material in this case, they were

6 primary [sic] calling residential telephone numbers.

7 Q. Where did they get the telephone numbers to call?

8 A. That is outside of the scope of my opinion.

9 Q. So, your opinion is that they were primarily calling

10 residential telephone numbers, but you don't know how they

11 obtained those numbers?

12 A. I do not know how they obtained those numbers.

13 Q. And you don't know whether they may have bought those

14 numbers from some type of lead generation company?

15 A. It's a possibility, but I just stated that I don't know

16 that.

17 Q. And you don't know, if they bought the numbers, where the

18 company who sold them the numbers might have gotten them?

19 **THE COURT:** Okay. She said she didn't know.

20 **MS. ECHTMAN:** Okay.

21 **BY MS. ECHTMAN:**

22 Q. And you know they wanted to call -- you think they wanted

23 to call residences, but their own call records showed that at

24 least 1,275 times, they reached businesses.

25 A. I already stated that that's correct.

1 Q. So you think it's a one-off if LexisNexis couldn't have a
2 number -- a business number?

3 **THE COURT:** I'm sorry. What?

4 **BY MS. ECHTMAN:**

5 Q. You think it's a one-off if LexisNexis couldn't identify a
6 business number?

7 A. As I stated, yes, those rounding issues do not change my
8 opinion.

9 Q. Well, would you agree with me that if LexisNexis thought
10 that any number that it didn't identify as either residential
11 or government must be residential, wouldn't they, then, have
12 checked that residential field?

13 **THE COURT:** Sustained as to what somebody else would
14 have done.

15 **THE WITNESS:** Um --

16 **THE COURT:** You don't need to answer.

17 **THE WITNESS:** Thank you.

18 **MS. ECHTMAN:** Well --

19 **THE COURT:** I mean, if -- you may be able to rephrase
20 that, but --

21 **MS. ECHTMAN:** Okay.

22 **BY MS. ECHTMAN:**

23 Q. Wouldn't you think if the people over at LexisNexis who
24 collect this data know how they collect it, if they consider --
25 if they were to have considered every number that was not a

1 business or not a government to be a residence, shouldn't you
2 expect that the residence field would be checked?

3 A. That would be an absolutely inappropriate step in the field
4 of data analysis, and I don't think any reputable data vendor
5 would ever consider doing that.

6 Q. But you've effectively done that. You're checking that box
7 for this case.

8 A. I am not a data vendor provider. I don't compile data. I
9 analyze data. So, I work in a very different field than
10 LexisNexis. LexisNexis, as I testified earlier, can only mark
11 a telephone number belonging to a residence. It's their
12 standard. I had numerous conversations about it with
13 LexisNexis. It is their standard, and -- I'm sorry. I repeat
14 it three times already. I'm going to repeat it one more time.

15 It is the standard that they have to have a source and a
16 date of that source stating that the number is residential in
17 order to market as such. Everything else, if it's not business
18 from the business directory, if it's not government from the
19 government directory is left blank. It is their standard.

20 My job is to look at that data as someone who's worked with
21 that data for 20 years and analyze it and provide an opinion.
22 And that's what I did in this case.

23 Q. So, as part of A.B. Data's work, you got also a report from
24 another source in connection with the notice function; right?
25 Did you get a report from something called Microtrace?

1 A. No.

2 Q. No, you never saw a report from Microtrace?

3 A. No.

4 Q. Okay. You're not aware of anyone who worked for you at

5 A.B. Data getting a report from Microtrace?

6 A. No.

7 Q. And when -- oh, I'm sorry. MicroBilt.

8 A. MicroBilt, yes.

9 Q. Okay. I'm sorry. I used the wrong name.

10 A. That's okay. I was confused for a second.

11 Q. I apologize for that. So, A.B. Data got a report at some
12 point from MicroBilt?

13 **MR. BARRETT:** Your Honor, objection. May we approach?

14 **THE COURT:** All right.

15 (Bench conference.)

16 **MR. BARRETT:** The MicroBilt data was used in
17 connection with sending class notice, not in connection with
18 her expert report. It was used to aid in locating class
19 members, names, and addresses. It's not relevant.

20 **MS. ECHTMAN:** But it identified businesses associated
21 with phone numbers that LexisNexis did not identify as
22 businesses and that she did not know about. She said about 25
23 times LexisNexis can find everything. Microtrace had
24 businesses associated -- in her own company's report that they
25 obtained had businesses associated with more phone numbers, and

1 they agreed to take them out of the case. She keeps saying
2 LexisNexis has everything. This is improper impeachment. She
3 knows and she's seen other sources that identify phone numbers.

4 **THE COURT:** Okay. Well, you can ask her why she used
5 other sources and why she didn't use other sources. There's no
6 problem with that.

7 **MS. ECHTMAN:** Well, can I ask her whether, in this
8 case, the report that her company obtained showed more
9 businesses that she didn't pick up from LexisNexis?

10 **MR. BARRETT:** And that is the rabbit hole problem that
11 leads us down towards names and addresses.

12 **MS. ECHTMAN:** I'm not getting into names and
13 addresses.

14 **THE COURT:** Okay. Well, you can ask her why she
15 didn't use other reports and that she has, you know, and we'll
16 just see where we go from there. I don't know what her answers
17 are going to be.

18 **MS. ECHTMAN:** But can I impeach her on the fact that
19 she had a report --

20 **THE COURT:** Well, first, you have to -- you have to
21 start at the beginning, so I don't know. I mean, you just have
22 to get started on it. You know, I'm indicating it's a subject
23 for impeachment, but --

24 **MS. ECHTMAN:** Okay.

25 **THE COURT:** -- you know, you need to start at the

1 beginning, and not the confusing part.

2 **MS. ECHTMAN:** I'm sorry.

3 **THE COURT:** Okay? All right.

4 **MR. BARRETT:** And be sure to use MicroBilt.

5 **MS. ECHTMAN:** I'm sorry.

6 **MR. BARRETT:** That's okay.

7 (Conclusion of the bench conference.)

8 **THE COURT:** Okay. Go ahead.

9 **BY MS. ECHTMAN:**

10 Q. Okay. So Ms. Verkhovskaya, at some point, in connection
11 with other work in this case, A.B. Data obtained a report from
12 a company known as MicroBilt; right?

13 A. That's correct.

14 Q. And it ran some of the telephone numbers in this case
15 against that report?

16 A. That's correct.

17 Q. And, are you aware that MicroBilt showed business names for
18 some of those phone numbers that hadn't been shown in your
19 LexisNexis report?

20 A. Yes, I am.

21 Q. And that's another category where Plaintiff removed numbers
22 from the case?

23 A. That's correct.

24 Q. Okay. So for those, MicroBilt showed that they were
25 businesses, and LexisNexis had missed it; right?

1 A. That's correct.

2 Q. All right. I'd like to show the witness DX25.

3 (Document handed to the witness by Ms. Echtman.)

4 **BY MS. ECHTMAN:**

5 Q. Okay. We've talked a bunch about a company called
6 PossibleNOW. And I believe that everyone heard that
7 Mr. Glasser said we're going to talk about PossibleNOW a lot.

8 Well, I'm showing you something that's a PossibleNOW --
9 PossibleNOW is a company in this industry, right? We talked
10 about the fact that it -- it helps manage the Registry for the
11 federal government; right?

12 A. That's correct.

13 Q. Okay. And it also helps -- works on scrubbing of lists,
14 right? It scrubs lists for companies against the National Do
15 Not Call Registry; right?

16 A. Correct.

17 Q. Okay. And PossibleNOW does a lot of things in this whole
18 TCPA field; right?

19 A. That is correct.

20 Q. Okay. So I'd like you to look at this report from
21 PossibleNOW.

22 **MS. ECHTMAN:** And if Trudy could bring the title up,
23 the first page up of DX25.

24 **BY MS. ECHTMAN:**

25 Q. If you look at this, do you see that this is an analysis of

1 the phone numbers on the National Do Not Call Registry that
2 PossibleNOW prepared for the Federal Trade Commission?

3 A. In 2009.

4 Q. In 2009. So, this report's actually dated March 31, 2009;
5 right?

6 A. That's correct.

7 Q. Okay. So that's about a year before the class period in
8 this case?

9 **THE COURT:** Are you asking?

10 **MS. ECHTMAN:** I'm asking.

11 **THE COURT:** Oh, okay.

12 **BY MS. ECHTMAN:**

13 Q. Do you agree that's about a year before the class period in
14 this case that starts in May 2010?

15 A. That's correct.

16 Q. Okay. And you see from this, the Federal Trade Commission
17 asked PossibleNOW to give it an analysis of the different types
18 of phone numbers that you might find on the National Do Not
19 Call Registry?

20 A. I don't see that --

21 Q. Okay.

22 A. -- but if that's what you say, that's what it is.

23 Q. Okay. Well, turn to page 2, where it says background.

24 Where it says: The National Do Not Call Registry has recently
25 grown to include more than 175 million phone numbers. The FTC

1 is interested in understanding more about the makeup of the
2 Registry in terms of the types of phone numbers that have been
3 entered on the Registry. You see that?

4 A. Yes, I do.

5 **MS. ECHTMAN:** Okay. Your Honor, I move to admit this
6 document into evidence under Federal Rule of Evidence
7 803(8)(A)(iii) as a record of a public office setting out
8 factual findings from a legally authorized investigation.

9 **MR. BARRETT:** Objection, Your Honor, under 402, 403 as
10 well.

11 **THE COURT:** Well, maybe we could take that -- can you
12 all step up to the corner for just a second?

13 (The following bench conference was recorded.)

14 **MS. ECHTMAN:** Your Honor --

15 **THE COURT:** Just a second. What did you say, 803
16 what?

17 **MS. ECHTMAN:** It's -- I'll show you. Here it is.
18 803, public office -- public records. A record or statement of
19 a public office --

20 **THE COURT:** Okay. I don't -- 803(8)?

21 **MS. ECHTMAN:** (8).

22 **THE COURT:** All right.

23 (Pause in the proceedings.)

24 **THE COURT:** Okay. Has this witness ever seen this
25 document before?

1 **MS. ECHTMAN:** I don't know. It's been produced in
2 this case.

3 **MR. BARRETT:** No, Your Honor.

4 **MS. ECHTMAN:** And it's actually along the lines
5 materials that form (unintelligible).

6 **COURT REPORTER:** Judge, I can't hear Ms. Echtman.

7 **THE COURT:** Okay. Well, first, before we -- okay. I
8 don't know how to say it any other way. You have to be very
9 close to this mike or the court reporter cannot pick your voice
10 up, okay? So you -- I can hear you, but she can't. So it
11 won't be in the record if she can't hear you. Okay?

12 **MS. ECHTMAN:** Okay.

13 **THE COURT:** All right. As to whether you can ask her
14 questions about it, if she's never seen it before, don't you
15 need to connect that first?

16 **MS. ECHTMAN:** Well, it's also -- falls under learned
17 treatise because it's a study by another company that's an
18 expert in the industry. And they actually endeavored to find
19 out what types of numbers -- different numbers were, and they
20 couldn't figure it out.

21 **THE COURT:** All right. Well, let me put aside the
22 question of whether it's admissible, but I'm going to let you
23 ask her questions about it to at least to a certain extent,
24 okay?

25 **MS. ECHTMAN:** Okay.

1 **THE COURT:** And we'll take that up at the lunch break
2 or this afternoon.

3 (Conclusion of the bench conference.)

4 **THE COURT:** All right. You can go ahead and ask her
5 some questions about the exhibit.

6 **BY MS. ECHTMAN:**

7 Q. Okay. Ms. Verkhovskaya, have you seen this document
8 before?

9 A. No.

10 Q. So I'll represent to you it's a document that DISH produced
11 in this case. So Plaintiff's counsel didn't give it to you?

12 A. No.

13 Q. But you see that it's a document where PossibleNOW went
14 about trying to identify -- figure out whether it could
15 identify the different types of numbers for the FTC that are
16 actually on the Do Not Call Registry; right?

17 A. I have not had the time to read, review, and form any
18 opinions about this document, so I don't know what it says.

19 Q. Okay. But PossibleNOW is another company in the field that
20 does this type of work; right?

21 A. Correct.

22 Q. And, in fact, they do it for the federal government; right?

23 A. Federal government is one of their vendors, and a lot of
24 private companies as well.

25 Q. And so, in this particular document, PossibleNOW was trying

1 to see for the federal government if they could figure out what
2 category different types of numbers fall into.

3 **THE COURT:** Okay. Counsel, you need to ask questions,
4 and you all -- I fussed with Mr. Glasser about this, so, you
5 know, the lawyers need to ask questions. The questions aren't
6 evidence. It's the answer of the witness that is the evidence.
7 All right. So --

8 **BY MS. ECHTMAN:**

9 Q. Okay. So I'm going to show you the document. Let's look
10 up the background of what PossibleNOW is doing here, okay? So
11 it says here in the background section on page 2 that the FTC
12 is interested in understanding more about the makeup of the
13 Registry in terms of the types of phone numbers that have been
14 entered on the Registry. Do you see that?

15 A. That's what it says.

16 Q. So -- and it says that PossibleNOW maintains a current copy
17 of the Registry, and it also maintains a number of databases
18 that can be used to analyze the makeup of the Registry. Do you
19 see that?

20 A. Yes, I do.

21 **MR. BARRETT:** Your Honor, we object to the questioning
22 regarding a document the witness has not previously seen.

23 **THE COURT:** Okay. Well, as to what the document
24 actually says, that's sustained.

25 **BY MS. ECHTMAN:**

1 Q. But you can see now that this is an analysis done by
2 another company as to whether or not they could identify
3 certain numbers as residential, government, or business? Do
4 you see that?

5 A. No, I don't.

6 Q. You don't see that? Can you look further into the
7 document?

8 **MR. BARRETT:** Your Honor, we also object under Rule
9 602 based on the witness's lack of personal knowledge.

10 **THE COURT:** Okay. Sustained as to what the document
11 says. So, I mean, you can ask --

12 **BY MS. ECHTMAN:**

13 Q. Well, in fact, Ms. Verkhovskaya, PossibleNOW -- are you
14 aware that there are certain numbers called direct inward dial
15 numbers?

16 A. Are you referring to 2009? Today? What's the time frame?

17 Q. Okay. I'm just asking you, at any time, are you aware of
18 something called a direct inward dial number?

19 A. Yes.

20 Q. And that's a type of business number; right?

21 A. Correct.

22 Q. And direct -- you agree with me that direct inward dial
23 numbers are not listed in the white pages; right?

24 A. I would disagree with that as a general statement.

25 To give you an example, A.B. Data has many of those

1 telephone numbers, and direct inward dial number at A.B. Data
2 was assigned to the main number for our sales department. It
3 was listed on our website and was listed in white pages.

4 Can I make a general statement that all businesses don't
5 list it? No, I can't, but it is outside of the scope of my
6 opinion.

7 Q. Well, some businesses may have, like AT&T, very, very many
8 direct inward dial numbers, right?

9 A. Possibly.

10 Q. And they won't necessarily list all of those numbers in a
11 business directory or the white pages, will they?

12 A. I wouldn't know what they do.

13 Q. You also said that there are -- you thought there were
14 three different types of numbers. You said that they're either
15 residential, business or government, right?

16 A. Correct.

17 Q. And are there also numbers that are just disconnected and
18 invalid?

19 A. At the point of my report where I describe three types of
20 telephone numbers that help me form my opinion, all of the
21 disconnected telephone numbers from Five9 source data were
22 removed.

23 **THE COURT:** You can take the document down.

24 **BY MS. ECHTMAN:**

25 Q. You're saying that all of the disconnected numbers were

1 removed?

2 A. That's correct.

3 Q. Okay. At what step in your analysis did you remove those
4 numbers?

5 A. The first. If you look at the funnel, the first step was
6 removal of all of the unconnected phone numbers. So if the
7 phone number is disconnected, it means there is no one picking
8 up the phone and connecting it.

9 Q. But if it's an inactive phone number that's been
10 disconnected, you can get a recording that says this phone
11 number is no longer in service, can't you?

12 A. Yes, you can.

13 Q. And then that would -- that would show it's connected,
14 wouldn't it?

15 A. Well, if the phone number is disconnected by the phone
16 company, that would not show as a connected. If that phone
17 number is part of a business, that will probably show up on a
18 Five9 record as abandoned because the call would drop, and
19 those were removed as well, even though the duration was a few
20 seconds.

21 Q. So you talked about you looked at the duration column to
22 determine whether a call is connected, right?

23 A. That's correct.

24 Q. And so if you reached -- if you called the number and got a
25 recording that the phone number is no longer in service, there

1 would be time in the duration call, right?

2 A. It's a possibility.

3 Q. And you don't know what "abandoned" means in the Five⁹
4 records, do you?

5 A. That's why we removed them.

6 Q. And you don't know that if a call center representative
7 heard a message saying this phone number is no longer in
8 service that they would mark "abandoned" in the disposition
9 field.

10 A. I do not have that knowledge.

11 Q. So you don't know that you actually removed any call that
12 connected to a message that says this number is no longer in
13 service.

14 A. I do not.

15 Q. And do you know how many inactive telephone numbers there
16 are in the United States right now?

17 A. I do not.

18 Q. And so you did not include that as one of your categories.

19 A. The date of 2017 is not relevant to my opinion.

20 Q. Well, you didn't check whether a number might have been
21 inactive in 2010 to 2011, did you?

22 A. No, I did not.

23 Q. And it was never part of your project in this case,
24 Ms. Verkhovskaya, to look for affirmative evidence that a
25 telephone number was residential at the time of the call,

1 right?

2 A. Can you please describe "affirmative evidence"?

3 Q. Well, you said, for example, LexisNexis doesn't mark
4 something as residential unless they have a piece of evidence,
5 right?

6 A. That's correct.

7 Q. And so you did not ever look for similar pieces of evidence
8 that a phone number was residential at the time of the call.

9 A. As I stated, I analyzed the entire data set to create a
10 methodology and did not engage in claims process where the
11 person who has the phone number actually sends me back a piece
12 of a claim form saying that they have that phone number.

13 Q. Let's look back at the stipulation regarding the call
14 categories that Mr. Barrett showed you. I think that -- has
15 that been marked as PX278? Do you have that there?

16 A. Yes, I do.

17 Q. Now, let's go to paragraph 3. Do you see that?

18 A. Which page, please?

19 Q. It's the first page, paragraph number 3.

20 A. I'm sorry. I don't have paragraph 3 on the first page.

21 Q. Amended joint stipulation regarding call category. Are you
22 on the other stipulation?

23 A. Oh, yes, I am.

24 Q. Okay. We'll hand that up to you.

25 (Document handed to the witness by Ms. Echtman.)

1 **THE WITNESS:** Thank you.

2 **BY MS. ECHTMAN:**

3 Q. Okay. So for paragraph 3, this is the one where it says
4 telephone number -- oh, I'm sorry. I'd like to go to
5 paragraph 2. Okay. Let's bring it up, please.

6 Paragraph 2. So this one is telephone numbers where
7 LexisNexis identifies them as residential before May 1, 2010,
8 or after August 1, 2011, right? And it says that they're
9 reflected on Exhibit 31A and there are 5,118 telephone numbers
10 and 14,519 calls. Do you see that?

11 A. Yes.

12 Q. So I believe you said that you looked at the residential
13 column as part of your work in this case.

14 A. Yes.

15 Q. Okay. And if -- if it was residential before May 2010, you
16 didn't exclude it because you thought it probably didn't
17 change, right?

18 A. That's correct.

19 Q. Okay. But then there are also some that were only
20 residential after August 1, 2011, in the LexisNexis report,
21 right?

22 A. That's correct.

23 Q. Okay. And you didn't exclude those either.

24 A. That's correct.

25 Q. Okay. But for those LexisNexis didn't have any data point

1 at any earlier time to show that it was a residential number.

2 A. Neither did they have any data point to show that they're
3 businesses. Therefore, I had no reason to exclude them in my
4 original opinion.

5 Q. Okay. And your testimony here for the jury is that in
6 connection with your original opinion that you gave in
7 January 2015 you considered this residential column, right?

8 A. Correct.

9 Q. And you also considered the date ranges that you got in the
10 LexisNexis data.

11 A. Yes, I did.

12 Q. Okay. So I'd like to show you, Ms. Verkhovskaya, what you
13 said about that at your deposition.

14 **MS. ECHTMAN:** If we could play clip VT512.

15 **THE COURT:** Okay. I don't think I can hear. Is it
16 possible to turn that up?

17 (Portion of deposition played, not reported by reporter.)

18 **BY MS. ECHTMAN:**

19 Q. Do you see at your deposition you said you didn't analyze
20 that column for this case?

21 A. I believe I was referring to last seen, first seen date.
22 Or can you show me which column I was referring to?

23 Q. Well, it's one called listing type --

24 **THE COURT:** Okay. You need to show her the
25 deposition. I don't --

1 MS. ECHTMAN: Can we play --

2 **THE COURT:** I couldn't really follow what was being
3 said in the video. I'm sorry. If you're going to ask her
4 about her testimony and she's looking at a document in her
5 testimony, she's asking for the document.

6 **MS. ECHTMAN:** Okay. Why don't we pull up the
7 document. I think we've got the LexisNexis data and we can
8 pull that up on the screen. It's TX what -- DX38 in native
9 form. Or even in PDF form. Okay. So can we scroll over?

10 | BY MS. ECHTMAN:

11 Q. There's a lot of different columns here. Do you see that?

12 **MS. ECHTMAN:** Can we scroll over? Okay. Scroll over
13 again.

14 Q. Okay. Here you see there is a column that says listing
15 type B-U-S, listing type R-E-S and listing type G-O-V.

16 **MS. ECHTMAN:** Can we play that testimony back again on
17 clip VT512?

18 (Portion of deposition played, not reported by reporter.)

19 | BY MS. ECHTMAN:

20 Q. Do you understand what column we're talking about now?

21 A. Yes, I do.

22 Q. And we've talked about that column for a while, right?

23 A. That's correct.

24 Q. And so when you were talking about the output that you

25 from LexisNexis and

1 identified something as residential, you were talking about
2 that column, right?

3 A. That's correct.

4 Q. But you said at your deposition you didn't analyze it for
5 this case.

6 A. I did not. I said I was not sure, and it looked like I had
7 a difficult time reading it. But it is my testimony today and
8 it is my opinion in the report that that was one of the columns
9 that was analyzed.

10 Q. Well, let me just read back your exact answer. "Yep,
11 that's not the column we analyzed for this case." Is that what
12 you said?

13 A. Can you play --

14 Q. Sure we can play that.

15 A. Because I don't think you're reading everything --

16 **THE COURT:** Could you show it to her rather than
17 playing it again? Could you give her the written transcript?

18 **MR. GLASSER:** We don't know what page and line.

19 **MS. ECHTMAN:** Page 110, line 7 to 16.

20 (Document handed to the witness by Ms. Echtman.)

21 **MR. BARRETT:** The page number?

22 **THE COURT:** Page 110.

23 **THE WITNESS:** So I said, "I'm not sure this is the
24 case in this matter." So at that time I was not sure whether
25 it was analyzed or not, but I am now.

1 **BY MS. ECHTMAN:**

2 Q. Well, the question, I think, was whether you know what that
3 column means from work on prior matters or no, and your answer
4 was: "It refers to confirmation whether it is a residential or
5 non, but I'm not sure whether this is the case in this matter."

6 A. What is your question?

7 Q. My question is: Weren't you saying that in response to a
8 question of what the column means? And we could look at more
9 context in the deposition if we look at more of the page. I
10 believe you were being asked what the different columns meant.

11 A. So I was not sure at that time. I am sure now.

12 Q. Okay. So you're --

13 A. I'm not sure what you want me to say here.

14 Q. Well, you just told us that you did specific work and you
15 relied on this column.

16 A. That was one of the columns I relied on, yes.

17 Q. Okay. And when we had your deposition in this case, you
18 said you didn't rely on that column and you didn't know what
19 that column meant in this particular report.

20 A. I said I was not sure. So I was confused by page 110
21 during the deposition. I've testified a number of times here
22 today that I considered that column. It is outlined in my
23 report that I considered that column.

24 Q. Okay. So let's also -- and so you're saying now also that
25 you considered date ranges that LexisNexis provided in its

1 report, right?

2 A. Correct. And I can sort of tell you that in my deposition
3 there was the same issue of confusion where I said that I
4 personally did not consider date ranges. That's because my
5 data team loads it for me. But we can go through this exercise
6 and go to that page in my deposition where I was not clear
7 about that as well.

8 Q. Okay. So what was in front of you at that deposition was
9 the LexisNexis report you got back that you premised a lot of
10 your opinion here today on, right?

11 A. That's correct.

12 Q. Okay. And so DISH's lawyer showed you that report and
13 asked you questions about specific fields that you're now
14 giving an opinion about, right?

15 A. It's the same opinion I produced in my report, yes.

16 Q. Right. And asked you what did you do with -- what does
17 this column mean and did you use it. And you said, "I didn't
18 use it and I don't know what it means." Let's pull it back up.

19 A. Yes, we can do that.

20 Q. Okay. But now I want to move on. So we talked about --
21 you said that for the residential column. Now we're going to
22 talk about dates. You're saying now that you relied on date
23 columns, right?

24 A. Well, as I stated earlier, it was loaded for me by the data
25 team based on the date range of first seen, last seen date.

1 Yes, I did rely on that.

2 Q. So at this same deposition when DISH's lawyer asked you
3 what does date first seen and date last seen mean in the
4 LexisNexis data, you didn't know.

5 A. I couldn't recall at that time, yes.

6 Q. Okay. You said you don't know what that column means at
7 that time.

8 A. I just testified I couldn't recall at that time.

9 Q. And did you also say -- and let's pull up page -- so
10 everyone knows what we're talking about, let's play VT516.

11 **THE COURT:** Where?

12 **MS. ECHTMAN:** Page 106, lines 3 to 25, VT516, if we
13 could play that so everyone can see.

14 (Portion of deposition played, not reported by reporter.)

15 **MS. ECHTMAN:** Can you stop that? I gave you the wrong
16 one.

17 **THE COURT:** It's really, really hard to hear and we
18 can't make it any louder.

19 **MS. ECHTMAN:** Okay. We'll pull up the transcript.
20 And I actually mean page 116 at line 20 to page 118 at line 18.
21 Lets pull that up, please.

22 **BY MS. ECHTMAN:**

23 Q. Okay. So starting here, the question is: "How about the
24 next column? It looks like the next two columns, DT first seen
25 and DT last seen, were those used in your analysis here?" Do

1 you see that?

2 A. Yes, I do.

3 Q. Okay. And your answer was: "Those are the dates that
4 LexisNexis utilizes for their internal use, but we did not use
5 those."

6 If you go to the next page, dates. Do you see that?

7 A. Yes, I do.

8 Q. Okay. And then, DISH's lawyer gives you an example of one
9 particular line where it says that for one particular phone
10 number, there was a date first seen of June 5, 2012, and a date
11 last seen, I think -- well, June 5, 2012 is the date first
12 seen, and he shows you that; right?

13 A. That's correct.

14 Q. And then he says: But it doesn't have a business -- and
15 your answer is: "But he doesn't have a business identifier, so
16 we didn't look at his record at all." Is that what you said at
17 your deposition?

18 A. That's what I said in my deposition.

19 Q. Okay. Was that right?

20 A. As you just misspoke a few minutes ago what was -- what
21 page number that was, I could not recall the details of those
22 two fields during my deposition.

23 Q. Okay. And you had an opportunity after your deposition was
24 taken to provide corrections; is that right?

25 A. It was few hours after my deposition, yes.

1 Q. No. But, when you have your deposition taken, you get a
2 copy of the transcript back, and you get an opportunity to
3 correct anything that was wrong.

4 A. I don't recall if we did in this case.

5 Q. Okay. So you don't recall if you went back and gave DISH
6 information that what you had said at the deposition was wrong?

7 A. I don't recall if we went through errata sheet on this
8 case.

9 Q. But you know when you have your deposition taken, you get
10 an opportunity to fill out an errata sheet where you can fix
11 anything that you got wrong?

12 A. We don't do it all the time.

13 Q. But when you gave this testimony at your deposition, you
14 gave it under oath; right?

15 A. That's correct.

16 Q. And you're not aware that you did anything to correct the
17 statements that you're now saying are wrong?

18 A. I'm doing it now.

19 Q. Okay. But before we got to trial, you didn't do it?

20 A. No, I did not.

21 Q. Okay. And so, if you go to another section of the
22 LexisNexis data, another section of this stipulation, there's
23 this whole piece where -- in paragraph 1, there's a lot of
24 numbers where LexisNexis doesn't fill out any of those three
25 columns we're talking about; right?

1 A. Correct.

2 Q. And so, there -- the parties stipulated that there are
3 5,258 telephone numbers and 14,815 telephone calls where
4 LexisNexis doesn't have any evidence that it's either business,
5 residential or government; right?

6 A. That's correct.

7 Q. And now, you said that Dr. Krakauer's number falls within
8 that; right?

9 A. That's correct.

10 Q. Okay. But here, the only way we know that Dr. Krakauer had
11 a residential number is he came to court and he told us; right?

12 A. That's correct.

13 Q. And you didn't do any other test against these LexisNexis
14 unknowns for this case of any other telephone numbers?

15 A. That's correct.

16 Q. All right. And then, in paragraph 3 of this stipulation,
17 there are telephone numbers that LexisNexis identifies as
18 unknown or can't fill the columns in the May 10 -- 2010 to the
19 August 2011 time period, but, at other times, it identifies
20 differently. So, at some point, it might say it's residential,
21 but it doesn't say it for the time period in this case; right?

22 A. Correct.

23 Q. All right. And so, paragraph 4, that's a category where,
24 again, sometimes LexisNexis will check the residential box, but
25 sometimes it won't.

1 A. Correct.

2 Q. And in paragraph 5, that's a situation where LexisNexis is
3 actually consistent and says it's residential; right?

4 A. That's correct.

5 Q. Okay. And what you testified at your deposition is you
6 didn't know at that time whether, for this case, that
7 particular report actually indicated that LexisNexis thought it
8 was residential? We can bring back up that testimony.

9 A. Um --

10 Q. Let's look at page 110.

11 **THE COURT:** Wait just one second.

12 **THE WITNESS:** That category was not discussed
13 separately until I saw the stipulation.

14 **BY MS. ECHTMAN:**

15 Q. Okay. But what you said at your deposition when DISH's
16 lawyer asked you: What does the residential column mean? You
17 said: I'm not sure for this case.

18 **THE COURT:** This is what you already went over with
19 her?

20 **MS. ECHTMAN:** Yes.

21 **THE WITNESS:** As I stated numerous time earlier, at
22 the time of my deposition, I could not recall that.

23 **BY MS. ECHTMAN:**

24 Q. All right. And then, there's also category number 6, and
25 those are telephone numbers that LexisNexis identifies as

1 cellular and possibly cellular. Do you see that?

2 A. Yes, I do.

3 Q. Okay. And that's 3,005 telephone numbers and 8,326 calls.

4 Do you see that?

5 A. Yes, I do.

6 Q. Okay. And you didn't -- you testified at deposition that
7 you didn't look at the cell phone field for purposes of this
8 case; right?

9 A. Correct.

10 Q. And do you know how LexisNexis might go about -- will you
11 agree with me that cell phone numbers are not listed in
12 telephone directories also known as the white pages?

13 A. I disagree. They're listed.

14 Q. You disagree that they're listed?

15 A. No, I disagree that they're not listed.

16 Q. Okay. So, in the white pages or 411, you think cell phone
17 numbers are listed?

18 A. They could be. Why wouldn't they be listed? If I have a
19 business that only has a cell phone number, that's how I'm
20 going to register my business.

21 Q. Okay. Well, I'd like you to look at DX25, the PossibleNOW
22 report. And if you go to page 2, there's a discussion there.

23 **THE COURT:** Okay. Sustained. She already said she'd
24 never seen this report.

25 **BY MS. ECHTMAN:**

1 Q. All right. But you're just assuming now that cell phones
2 are listed in 411?

3 A. I have no opinion one way or another, but I'll just -- I
4 have no opinion one way or another.

5 Q. Okay. So, if LexisNexis might think that a cell phone is
6 residential or business or government, you don't know where
7 LexisNexis gets that information?

8 A. It is -- identification of cell phone numbers falls outside
9 of the scope of my opinion and my analysis of this case. I
10 only identified which telephone numbers were businesses,
11 government or residential. Whether they're cell phone or not,
12 it's not the work that I did.

13 Q. Well, just hypothetically, if I have a cell phone that I
14 primarily use for business, and I don't have it listed in the
15 white pages, and it's not on any of my company directories, and
16 I don't give it out to people other than those people I really
17 want to hear from, LexisNexis would never know what my cell
18 phone is used for; would it?

19 A. I have no opinion. I can't comment on that in any way,
20 shape, or form.

21 Q. Okay. Do you have any opinion as to whether a lot of
22 people use cell phones primarily for business?

23 **THE COURT:** Okay. She's already said she doesn't have
24 any opinions about cell phones, so let's move on.

25 **MS. ECHTMAN:** Okay.

1 **BY MS. ECHTMAN:**

2 Q. So -- but, in this case, you're saying that for all those
3 cell phone numbers, you think they're more likely than not
4 residential, even though --

5 A. Well, I didn't form the opinion that they're cell phone
6 numbers. I formed an opinion that these records were
7 residential.

8 Q. And you didn't look specifically about -- at that column in
9 LexisNexis data about cell phones?

10 A. No, I did not.

11 Q. And do you know whether there are sources that can tell you
12 whether a phone number is a cell phone?

13 A. Yes, there are.

14 Q. And if LexisNexis is listing them as cell phones, do you
15 expect that LexisNexis is using a reliable source?

16 A. I have no opinion how they used that data in this
17 particular report in this particular case. It was outside of
18 the scope of my opinion. My work was focused on businesses
19 numbers, residential numbers, and government.

20 Q. So let's move on to a different topic. I want to talk a
21 little bit about the Five9 call records; okay? And if we could
22 go back to your funnel, you looked at call records that had a
23 total of 1,661,318 calls; right?

24 A. That's correct.

25 Q. Okay. And your opinion here today is that SSN made 51,119

1 connected calls, correct, to 18,066 telephone numbers on the
2 Registry; right? Is that your opinion?

3 **THE COURT:** Where are you getting those numbers?

4 **BY MS. ECHTMAN:**

5 Q. After you -- let's go to the second page, after you take
6 out the -- everything that Plaintiff agreed not to pursue.

7 A. No, that's not my opinion. My opinion is on the first
8 page.

9 Q. Okay.

10 A. This page is what you agreed with Plaintiff's attorneys and
11 I was not part of that process.

12 Q. You were not part of that process. But, you reviewed the
13 stipulation and you saw the different categories and the
14 reasons why Plaintiff's counsel agreed to remove them?

15 A. Correct.

16 Q. And some of them is because you missed some things; right?

17 A. I don't have an opinion on that.

18 Q. You didn't check. All right. So, can you tell me out of
19 the 1 point --

20 **THE COURT:** Okay. If you're going to ask her a
21 question, you need to let her answer. You said you didn't
22 check. Was that a question?

23 **BY MS. ECHTMAN:**

24 Q. You didn't check?

25 A. I didn't check what?

1 Q. The columns in that stipulation that Plaintiff's counsel
2 showed you about the reasons why that they agreed to remove
3 some numbers in this case that had been included in your
4 opinion.

5 A. I personally did not check. I was actually -- during this
6 process, I was on vacation out of the country.

7 Q. Okay. Did you think it might be important to check before
8 you came here to testify?

9 A. To check whether the stipulation that you two agree -- that
10 both parties agreed upon is accurate? I'm sorry. What is your
11 question?

12 Q. To check whether there are numbers in that stipulation that
13 result from mistakes that you made or things that you missed.

14 A. It would have been great to check if I had time.

15 Q. All right. And you've been here for how long before you
16 got on the stand to testify?

17 A. I've been here for a few days, since Saturday.

18 Q. Since Saturday. Okay. And so, during that time, from
19 Saturday through to today, you didn't have time to check?

20 A. No, because in order to check this properly, you have to
21 load all that data into Sequel Database, which I don't have
22 here with me, and the computing power that is necessary to go
23 through proper process, I don't have it here. It actually took
24 me over 45 hours to get here from my vacation. And then, I got
25 very ill, so even if I didn't get sick, I would not have the

1 equipment here to do a proper check.

2 Plus, since both parties already agreed, I didn't feel that
3 I needed to involve my stuff -- my staff, sorry, to go through
4 the process of doublechecking every single phone number on the
5 stipulation.

6 Q. So did you ever -- so can you tell us, out of the
7 1.66 million calls, what percentage of those calls are in your
8 opinion here? What percentage of 1.66 million is 20,450?

9 A. You want me to do the math?

10 Q. It's a small percentage, isn't it?

11 A. It is a small.

12 Q. All right. And doing your work, I think you said that you
13 sought to exclude calls made by SSN that didn't connect; right?

14 A. That is correct.

15 Q. And so, the way you did that is you excluded things with a
16 zero duration; right?

17 A. That's correct.

18 Q. And you excluded other things based on the disposition
19 code; right?

20 A. That is correct.

21 Q. Okay. And you excluded things that looked like inbound
22 calls; right?

23 A. Correct.

24 Q. And so, after you did all that, you had 230,121 remaining
25 calls that you analyzed; right?

1 A. That is correct.

2 Q. And you talked a little bit about the calls to
3 Dr. Krakauer. I'd like to bring up PX16, which is a document
4 that Plaintiffs, I think, put together showing a summary of the
5 calls to Dr. Krakauer on the Five9 logs. Do you recognize --
6 do you recognize this? I can hand it up to you. There's two
7 pages actually.

8 A. Yeah, I was going to say I think it's missing some.

9 Q. It's two pages. Okay. So this is --

10 **THE COURT:** All right. I think the question is, do
11 you recognize it?

12 **THE WITNESS:** Yes, I do.

13 **BY MS. ECHTMAN:**

14 Q. Okay. Did you prepare this or someone who works for you
15 from the Five9 logs?

16 A. I'm not sure who prepared it.

17 Q. Okay. But you recognize this as a list of the 10 calls to
18 Dr. Krakauer?

19 A. Yes, I do.

20 Q. Okay. And these were all in the Five9 call records for
21 this case; right?

22 A. Correct.

23 Q. And you eliminated five of them because, in your opinion,
24 they didn't connect?

25 A. And one of them was -- had a disposition call abandoned,

1 though it did have --

2 Q. Well, second page, I think, has your duration --

3 A. Thank you.

4 Q. -- if that's what you're looking for. Yeah.

5 A. Sorry. I -- I can't -- I have to count the lines because
6 there are no line numbers.

7 **THE COURT:** You can pull the staple apart if that
8 would help you.

9 **THE WITNESS:** Yeah. Thank you.

10 So, the duration of the abandoned call was three seconds,
11 but we removed it as well, as I testified earlier, just out of
12 abundance of caution.

13 **BY MS. ECHTMAN:**

14 Q. And you removed those calls because you don't know that
15 Dr. Krakauer ever knew those calls were made; is that why, if
16 they weren't connected?

17 A. We removed those calls as part of our process to remove
18 unconnected calls and other types of calls based on disposition
19 that we thought should not be included.

20 Q. All right. And you thought that they should not be
21 included because the person might never know that call was
22 made, because on a busy signal, the call never rang; right?

23 A. Well, that was -- in the field of data analysis, we look at
24 data. We don't consider what people think on the other line --
25 on the other side of the phone call, so, no, we did not

1 consider what people thought.

2 Q. Okay. So you don't know, for any of the calls based on
3 your analysis, whether anyone ever heard the phone ring.

4 That's not part of the work you did.

5 A. No.

6 Q. And so, for the connected calls or what you consider not to
7 be connected calls, you don't know whether the phone ever rang?

8 **THE COURT:** I'm sorry. What?

9 **BY MS. ECHTMAN:**

10 Q. For the connected calls and the nonconnected calls, you
11 don't know whether anyone ever heard a phone ring?

12 A. I don't know if people have their phones on silence. I
13 don't know if they have dinner at that time. I don't know what
14 they were doing.

15 Q. And do you have any -- can you tell us why you eliminated
16 calls that didn't connect? Is there a particular reason you
17 eliminated calls that didn't connect?

18 A. Yes. We felt that -- there are several reasons. First,
19 when we prepare these types of reports, we always eliminate
20 calls that don't connect from our analysis or set it aside in a
21 special category, just like we remove abandoned calls, because
22 we want to create a fair report. And that was part of our
23 process and part of our thinking.

24 Q. And in the duration column -- if you go to the second page
25 of this, will you agree with me that in the duration column,

1 all of the calls that Dr. Krakauer is suing on come to a total
2 of about two and a half minutes of time?

3 A. Approximately.

4 Q. And if you go back to the first page, there's a disposition
5 code called "recycle." Do you see that?

6 A. Yes, I do.

7 Q. And you don't know what that disposition code means, do
8 you?

9 A. Well, in Five9 records, when we received the original
10 source data, we did not have a description of that. From my
11 experience in prior cases, I have some thoughts on that, but I
12 don't think it's relevant for this case. For this case, I
13 never received a detailed description from Five9 or SSN stating
14 what they meant by this particular disposition code.

15 Q. So, again, you just don't know -- you don't know what
16 happened on that call because you don't know what that
17 disposition code means.

18 A. I don't have a description from Five9 defining that code.

19 Q. And I just want to show you some samples from the Five9
20 data about some particular calls, and you don't know how long a
21 call that might be labeled "recycle" would necessarily have
22 last -- lasted, do you?

23 A. That is outside of the scope of my analysis.

24 Q. So I want to ask you about one particular telephone call
25 with recycle, and I'll show you an example of what the call

1 records look like for that call.

2 **MS. ECHTMAN:** DX208.

3 **THE COURT:** I'm sorry. What is it, did you say?

4 **MS. ECHTMAN:** It's DX208. I'll give it out.

5 (Document handed to the witness.)

6 **BY MS. ECHTMAN:**

7 Q. So just to make things easier, because the Five9 records
8 are voluminous, what we did here is we took out -- like you did
9 for Dr. Krakauer, we took out all of the Five9 records and put
10 this on this piece of paper for the phone number (203)
11 685-7296. Do you see that phone number in the DNIS column?

12 A. This is the first time I'm seeing this particular
13 spreadsheet.

14 **THE COURT:** So you're saying this is not a page from
15 the Five9 records; it's some information you created from those
16 records?

17 **MS. ECHTMAN:** We took out of the Five9 records all of
18 the data about this phone call and put it right here at this
19 exhibit so we could see it in one place. So I can show the
20 witness that this phone number -- it's a demonstrative.

21 **THE COURT:** I understand. Go ahead.

22 **BY MS. ECHTMAN:**

23 Q. And I can show you this is a phone number in the case,
24 (203) 685-7296. Okay. Do you see that under DNIS?

25 A. Yes.

1 Q. Do you understand that in the Five9 records that DNIS is
2 the number that was called?

3 A. Yes, I do.

4 Q. Okay. And for this particular phone number, this shows
5 that that number was called four times, right? We gave you
6 four phone records?

7 A. Well, I -- if you say so. I have not had the chance to
8 review it.

9 Q. Okay. Well, I can show you -- did you put together a
10 document that shows all of the phone numbers in the case and
11 how many times each one of them was called?

12 A. Not as part of my original opinion.

13 Q. Okay. Did you do it later in preparation for trial?

14 A. It was done. I reviewed that document. It was part of one
15 of the -- I don't think it was done in all Five9 records
16 actually.

17 Q. Or just for the ones that are part of what you consider to
18 be the class in this case, right?

19 A. That's correct, yes.

20 Q. Right. So you put together an exhibit that says what phone
21 numbers and how many calls, right?

22 A. That's correct.

23 Q. Okay. But your counsel didn't use that with you in your
24 direct examination?

25 A. That's correct.

1 Q. Okay. But do you want me to show that to you so you can
2 check --

3 A. Yes.

4 Q. -- whether this phone number is in the case, and it was
5 called four times?

6 A. Yes.

7 Q. So let's do PX2000.

8 (Document handed to the witness.)

9 A. Thank you.

10 Q. Okay. And I'll tell you, if you go to PX2000 and you look
11 at page 5 on the top left --

12 **MS. ECHTMAN:** Yeah, if you could bring that up,
13 PX2000.

14 **BY MS. ECHTMAN:**

15 Q. Go to page 5 on the top left. You can find this phone
16 number, which is (203) 685-7296, because you put the numbers in
17 order, right? (203) 685-7296 on page 5, please, on the left.
18 It's one, two, three, four, five, six -- about eight or nine
19 down. Okay. Do you see that?

20 A. Yes, thank you.

21 Q. And you see that in this class, there are four calls to
22 that number, right?

23 A. That's correct.

24 Q. Okay. So what we did here is took those four calls and put
25 them up on DX208.

1 **MS. ECHTMAN:** If you could bring that up, please.

2 **BY MS. ECHTMAN:**

3 Q. Okay. And so you see here that the disposition for those
4 four calls is three recycles and one disconnect, right?

5 A. Yes.

6 Q. And those are all dispositions that you included as
7 connected calls, right?

8 A. Correct.

9 Q. Okay. And you see that the duration for each of those
10 calls is 4 seconds?

11 A. Yes, that's what it says.

12 Q. Okay. And so that shows that for that particular phone
13 number in the class, there were four calls for 4 seconds each,
14 right?

15 A. That's what it states.

16 Q. Okay. And you don't know for those four calls of 4 seconds
17 each whether anyone ever heard the phone rang?

18 A. I already testified to that.

19 Q. And you don't know whether anyone ever connected to a
20 person on the other end of the line, right?

21 A. That's correct.

22 Q. And you didn't exclude calls with a duration of less than 5
23 seconds, did you?

24 A. No.

25 Q. Okay. So I want to show you another example.

1 **MS. ECHTMAN:** I'd like to move DX208 into evidence,
2 Your Honor.

3 **MR. BARRETT:** Your Honor, I object on foundation
4 grounds.

5 **THE COURT:** All right. Well, we'll talk about that at
6 the lunch break.

7 **BY MS. ECHTMAN:**

8 Q. All right. So now I'd like --

9 **THE COURT:** How much longer are your questions for
10 this witness? Normally, we would go to lunch now. Is this a
11 good time?

12 **MS. ECHTMAN:** I'm almost done. If I could have no
13 more than 10 more minutes?

14 **THE COURT:** I think we'll do that after lunch
15 because --

16 **MS. ECHTMAN:** Okay.

17 **THE COURT:** Well, I mean, they're going to have
18 redirect, too. I just don't want to impose any unreasonable
19 burden on the jury here. It's a quarter of one.

20 So ladies -- I'll ask the witness to step down, please.

21 (The witness left the stand.)

22 **THE COURT:** Okay. Ladies and gentlemen, I'm going to
23 excuse you all for the lunch recess. Please come back at
24 two o'clock. Remember not to have any contact with the
25 lawyers, parties, or witnesses. Don't form any opinion and

1 keep an open mind and come back at two o'clock.

2 (The jury left the courtroom.)

3 All right. Your objection to Defendant's -- let's see. I

4 think I withheld ruling on a number of different objections I

5 probably, over the lunch break, ought to go through.

6 Defendant's 208 that was just mentioned and then I think there

7 was another one earlier, I'll try to look at that over the

8 lunch break; but as to 208, what's your objection?

9 **MR. BARRETT:** Lack of foundation. The witness is
10 being presented with this document and told what it is based
11 upon counsel's statement about what it is, so there's no
12 foundation. That's number one.

13 Number two is I think what Ms. Echtman had referred to in
14 one of our pretrials as onesies, twosies, threesies process of,
15 you know, as she said, chipping away at the edges of the call
16 records rather than addressing the methodology and reliability,
17 which she has had ample opportunity to address.

18 **THE COURT:** Okay.

19 **MS. ECHTMAN:** So, Your Honor, I believe that you ruled
20 that it's our right to do onesies, twosies. I only have about
21 a few more minutes of it. What we've done here is try to make
22 it easy for the jury to understand what we're talking about and
23 to see an example. They can compare it against the call
24 records and make sure it's there. It would just be a very
25 laborious process. I just have a few of those examples just to

1 give a flavor, and we have the right -- I think we have the
2 right to do that, and the Court said we could, although you
3 wouldn't put it on the verdict form that we could do this type
4 of cross.

5 **THE COURT:** All right. Well, I don't have any problem
6 with the questions. I'll let you ask her the questions, but as
7 to the foundation of the exhibit, I mean --

8 **MS. ECHTMAN:** I can walk through and pull up the call
9 records and walk her through all of them. I think it would be
10 much --

11 **THE COURT:** Well, that's up to you. They've objected
12 on foundation grounds, and I'll sustain that.

13 All right. The other objection I think was to this report
14 from PossibleNOW.

15 **MS. ECHTMAN:** PossibleNOW.

16 **THE COURT:** You know, I'm not saying I'm not going to
17 let it in ever, but I'm not going to let it in now. If you've
18 got somebody who's seen it and who -- you know, and it's
19 relevant, you know, but this witness has nothing to say about
20 it. So I don't see really at this point that it should be
21 admitted. We can talk about that again if there's --

22 **MS. ECHTMAN:** Well, Your Honor --

23 **THE COURT:** -- somebody else who is going to testify
24 about it.

25 **MS. ECHTMAN:** -- I think we've established with the

1 witness enough foundation to get it into evidence as, one, a
2 report prepared for the FTC to analyze something that the FTC
3 requested to be analyzed under one provision of the rule, and
4 it also falls under the treatise exception. This is another
5 company in her line of business that she conceded that did an
6 analysis to see if they could identify types of numbers, and
7 they couldn't do it. So that's all fair impeachment.

8 **THE COURT:** She testified as to nothing about this
9 document. She had never seen it before. She didn't say it was
10 the kind of document on which she would rely. She didn't say
11 it had any relevance to her decision, and you have not
12 presented any evidence yet from anybody else to indicate that.
13 I'm just having -- I mean, they objected on this ground, so I'm
14 having a little trouble with that at this point.

15 **MR. BARRETT:** They have an expert witness --

16 **THE COURT:** Say again?

17 **MR. BARRETT:** They have an expert witness, I believe,
18 who will address this document, so they will have an
19 opportunity to present it.

20 **THE COURT:** I mean, if you've got somebody who is
21 going to talk about the document, then, we can -- you know --

22 **MS. ECHTMAN:** Well, Your Honor, also we -- I think we
23 laid a foundation under exceptions to the hearsay rule to get
24 the document in and of itself, and then we can publish it to
25 the jury.

1 **THE COURT:** It has to be relevant.

2 **MS. ECHTMAN:** The relevance is that you can't often
3 identify the nature of telephone numbers, which is completely
4 contrary to a new opinion that Ms. Verkhovskaya just gave now
5 at trial.

6 **THE COURT:** Okay. Can you remind me of the exhibit
7 number? I apologize.

8 **MS. ECHTMAN:** 25.

9 **THE COURT:** Well, I'll take a look at it again to see
10 if I can tell that in and of itself and it doesn't need a
11 witness to explain it, but it seems to me it's the kind of --
12 she has not said that this is the kind of document that's
13 important or relevant or the kind of thing -- you know, all of
14 that is the basis of her opinion, and I don't -- so I'll look
15 at it again, but at this point, I'm not inclined to let it in.

16 **MS. ECHTMAN:** Okay. Your Honor, just to be clear, our
17 position is it's fair impeachment to her opinion that she
18 always knows what type of number -- she can tell to a
19 reasonable degree of certainty what type of telephone number
20 something is because she didn't consider this. She doesn't
21 know anything about it. It's something that she should know if
22 she's going to offer this type of opinion, and, in fact, Your
23 Honor, we move to strike because --

24 **THE COURT:** Okay. Well, you didn't ask her any of
25 those questions. I don't -- I mean, you didn't ask her if it

1 was the kind of thing she would normally consider. I didn't
2 hear that. Did you?

3 **MS. ECHTMAN:** But it should come in substantively,
4 Your Honor, as well.

5 **THE COURT:** Okay. And you were doing something
6 that -- you changed topics to do something else.

7 **MS. ECHTMAN:** So we'd also like to move to strike
8 Ms. Verkhovskaya's opinions because they were not disclosed in
9 her report. I think we've handed up her report. Nowhere in
10 her report does she affirmatively say the things she said on
11 the witness stand, and under the federal rules, you have to
12 state your specific opinions and the basis for them. They
13 can't be by implication or assumed.

14 Nowhere in her report does it say that it's her opinion
15 that anything that's not identified as business is residential,
16 and nowhere in her report does it say that she expects
17 LexisNexis to be able to identify every business number, and by
18 implication, everything else is residential. We heard that
19 opinion, and that was the summary of her opinion, which they
20 elicited numerous times, is nowhere in her report, and it
21 should be stricken because it was not disclosed in connection
22 with the federal rules. It was not disclosed before trial.

23 There's a supplementation obligation under 26(e). She said
24 things that are contrary to her deposition testimony. Under
25 both the rules about errata and under 26(e), experts have a

1 duty to supplement --

2 **THE COURT:** Okay. So about the errata, the only thing
3 you can correct on an errata sheet is a typo or a clerical
4 error. You cannot make substantive changes to your deposition
5 in an errata sheet. I mean, that is -- I believe, now unless
6 they've changed the rule on me, but, you know, if a witness
7 says the answer is yes at the deposition, they can't come back
8 and say, oh, wait, I was mistaken; it's no. You can only say
9 the court reporter took it down wrong, or it was 534 and not
10 532. The court reporter heard it wrong. You know, that --
11 that's not -- I do not believe that that is correct, but
12 putting that little very small problem aside, you know, if you
13 can finish your argument --

14 **MS. ECHTMAN:** Yes. I would like --

15 **THE COURT:** -- without repetition.

16 **MS. ECHTMAN:** I would like to direct Your Honor to
17 Rule 26(e)(2) on supplementing disclosures and responses, and
18 it says: "For an expert whose report must be disclosed under
19 Rule 26(a)(2)(B), the parties' duty to supplement extends both
20 to information included in the report and to information given
21 during the expert's deposition. Any additions or changes to
22 this information must be disclosed by the time of the parties'
23 pretrial disclosures under Rule 26(a)(3)."

24 **THE COURT:** All right.

25 **MS. ECHTMAN:** Those were due a long time ago. She

1 gave us a lot of information and contradicted her deposition
2 testimony, and she testified she never corrected it and she
3 never disclosed that she was going to say something different
4 at trial, and all of that should be stricken.

5 **THE COURT:** All right.

6 **MR. BARRETT:** Your Honor, page 1 of her report -- I
7 can put it on the ELMO so you can read it.

8 **THE COURT:** I looked at it during the morning recess,
9 but you can put it up there again.

10 **MR. BARRETT:** It's quite clear in the highlighted
11 paragraph. "A.B. Data understands that Plaintiff alleges in
12 Count One of the complaint," which is this count, "that he and
13 imputed class members, whose residential telephone numbers were
14 listed on the NDNC, received two or more telemarketing calls
15 from SSN promoting the sale of DISH Services during a 12-month
16 period. I directed an analysis of the call records to identify
17 persons who received such calls, residential" -- it's all
18 there, two or more.

19 And, you know, they -- you know, so it's right there. We
20 were going to clear that up on redirect. It's not in her
21 summary, but it's right there on page 1.

22 **MS. ECHTMAN:** Your Honor, I have to say that's not at
23 all clear. Such calls are the calls that were made -- that are
24 the telemarketing calls from SSN, and she said, "I analyzed
25 whether they are on the NDCR for at least 30 days" --

1 **THE COURT:** You have to slow down if you're going to
2 read out loud.

3 **MS. ECHTMAN:** So when you see such calls, such calls
4 are the telemarketing calls from SSN, which she claims to be
5 promoting the sale of DISH Services. "I directed analysis of
6 the call records to identify persons who received such calls.
7 My interpretation of such calls are the telemarketing calls
8 from SSN," and she said she looked at whether they were on the
9 list for at least 30 days, and she looked at which telephone
10 numbers were identified as business. Nowhere in this report
11 does she affirmatively say, in any of the words she used on
12 that witness stand that it's her opinion to a reasonable degree
13 of certainty that these are residential.

14 **MR. BARRETT:** They did not ask the questions that they
15 are asking how. Her opinion was then and is now that these are
16 residential telephone numbers. It has not changed. There is
17 no new opinion. She doesn't ask herself the questions. That's
18 not the way the process works. They ask questions. They took
19 her deposition, and after that, they had the opportunity to
20 submit expert reports.

21 They chose -- they rode the wrong horse. They chose two
22 experts who are testifying only about -- well, one who is
23 testifying only about class certification, ascertainability,
24 and Your Honor certified the class. The other testified about
25 something that has nothing to do with Ms. Verkhovskaya's

1 opinions, and, in fact, the name Verkhovskaya does not even
2 appear in his responsive report.

3 Had they done an analysis that Ms. Verkhovskaya did, we
4 would not be muddling through DX208 and dealing with
5 authentication -- foundational issues. They would have their
6 own expert, but they never did that because they rode the wrong
7 horse.

8 **MS. ECHTMAN:** And, Your Honor, if I might say,
9 Plaintiff has the burden of proof, and if we look at an expert
10 report and it doesn't offer an opinion on the ultimate
11 question, then it's clear to us; we don't have to get up and
12 rebut it. We -- the obligation under Rule 26 is to make an
13 affirmative disclosure, not to sandbag, to put ultimate
14 opinions in the report.

15 **THE COURT:** All right. Motion to strike is denied.
16 Anything else?

17 **MR. BARRETT:** No, Your Honor.

18 **THE COURT:** All right. We'll be in recess until
19 two o'clock.

20 (A noon recess was taken from 1 p.m. until 2 p.m.)

21 **THE COURT:** All right. I know we did not take up the
22 question of Ms. Taber McRae at the lunch break, because I
23 forgot, and you all didn't remind me, but don't let me forget.
24 I will do it.

25 **MR. EWALD:** We won't. We wanted you to eat your

1 lunch.

2 **THE COURT:** I appreciate that. And you all need to
3 eat, too, but we can, if nothing else, stop 10 or 15 minutes
4 early and do it then.

5 Is there anything else for the Plaintiff we need to take up
6 before the jury comes in?

7 **MR. BARRETT:** No, Your Honor.

8 **THE COURT:** For the Defendant?

9 **MS. ECHTMAN:** No, Your Honor.

10 **THE COURT:** All right. I did look over Plaintiff's 25
11 in more detail. I think it was the first time I've seen that.
12 Maybe I saw it somewhere along the way. I'm still
13 contemplating that, particularly the part that says -- I think
14 it's under "Analysis," and it says 20 percent plus of the
15 numbers on the Do Not Call Registry are business numbers. I
16 take it that's the primary thing the Defendant is interested
17 in.

18 **MS. ECHTMAN:** Well, actually, for this particular
19 witness, the primary thing we're interested in is that there
20 were so many numbers -- you know, we're -- it's hard. We're
21 having this argument while the witness is in the courtroom.

22 **THE COURT:** I'm not asking you about this witness.

23 **MS. ECHTMAN:** Okay.

24 **THE COURT:** So, I mean, I've already said I'm not
25 going to let you ask this witness questions about a document

1 she's never seen before, at least until we can somehow
2 establish through her that that's appropriate. But what I'm
3 asking you -- you want to admit it substantively you have told
4 me.

5 **MS. ECHTMAN:** Yes.

6 **THE COURT:** So my specific question is, other than
7 that one thing I just said, 20-plus percent of the numbers are
8 business numbers, is there other specific -- I'm sure you would
9 call them facts, plaintiff probably wouldn't -- but
10 information, in any event, in that report you are specifically
11 interested in?

12 **MS. ECHTMAN:** Yes. There are 38 million telephone
13 numbers on the Registry where PossibleNOW, another company
14 that's an expert in the industry, couldn't figure out what they
15 were; and they say that means that they were unknown, so they
16 assume that they must be direct dial business numbers,
17 voice-over IP numbers and unlisted numbers. And those are just
18 landlines. And they don't try to categorize cell phones and
19 all, and that's about 50 percent of the numbers on the
20 registry. So PossibleNOW tried to tell --

21 **THE COURT:** I'm not asking you for any argument. I'm
22 just asking you to identify the specific parts you are
23 interested in substantively having admitted.

24 **MS. ECHTMAN:** Yes.

25 **THE COURT:** Is that it?

1 **MS. ECHTMAN:** Those are the general sections about
2 what information was available to them and what they could not
3 know and that there are a lot of business numbers on the
4 registry.

5 **THE COURT:** All right. Thank you. We'll talk about
6 this again. I just wanted to have in my mind exactly the
7 part -- I mean, there's a lot in there, you know, that doesn't
8 really have anything to do with the case, so I wanted to be
9 sure I had everything in mind.

10 Okay. Are we ready for the jury?

11 **MR. BARRETT:** Yes.

12 **THE COURT:** Yes. All right. Bring the jury in.

13 I think I said Plaintiff's 25, but I meant Defendant's 25,
14 the document we were just discussing, the PossibleNOW report
15 for the FTC.

16 (The jury entered the courtroom.)

17 **THE COURT:** All right. The witness can return to the
18 witness stand.

19 (The witness returned to the witness stand.)

20 **THE COURT:** All right. Go ahead, Ms. Echtman.

21 **BY MS. ECHTMAN:**

22 Q. Okay. I'd like to show the witness, please, another call
23 record sample. It's DX209.

24 (Document handed to the witness by Ms. Echtman.)

25 **THE WITNESS:** Thank you.

1 **BY MS. ECHTMAN:**

2 Q. So, Ms. Verkhovskaya, this is a document about phone
3 number (209) 369-6048.

4 **MS. ECHTMAN:** If you can bring it up, please, on the
5 screen.

6 **THE COURT:** Marlene.

7 **MS. ECHTMAN:** May we please have permission --

8 **THE CLERK:** I'm sorry.

9 **MR. BARRETT:** Your Honor, object on lack of foundation
10 grounds.

11 **THE COURT:** Okay. Well, it's not been admitted,
12 right?

13 **MR. BARRETT:** Correct.

14 **THE COURT:** Okay. You can take it off the screen.

15 **BY MS. ECHTMAN:**

16 Q. I'm going to ask you questions about a particular phone
17 number that's within the claimed class within the scope of your
18 opinion, and that number is (209) 369-6048. And let -- if you
19 still have PX2000 there, which is a list of all the telephone
20 numbers in the class, if you could take that; and if you look
21 on page 11 of 64 in the middle of the page, I think you'll find
22 that phone number (209) 369-6048. Do you see that? And
23 there's -- that says there's two calls in the class to that
24 number. Do you see that?

25 A. Yes, I do.

1 Q. Okay. So that's one of the telephone numbers and telephone
2 calls that you're offering an opinion on here, right?

3 A. Correct.

4 Q. Okay. So if you could look at our Exhibit 209, this is a
5 document where we summarized for you the call records about
6 that particular phone number, just the two lines from that SSN
7 Five9 call records. Okay. And then I'll tell you that for
8 these two the disposition is dial error.

9 Are you familiar with a disposition code in the Five9 call
10 records called dial error?

11 A. I'm familiar that that disposition was part of the calling
12 records.

13 Q. And that's not a disposition that you excluded?

14 A. That's correct.

15 Q. And in addition to having a disposition dial error, one of
16 them has a duration of 3 seconds and another has a duration of
17 2 seconds. Did you exclude calls that were less than 4
18 seconds?

19 A. As I testified a number of times earlier and as stated in
20 my report, I only included calls that were connected based on
21 excluding duration of 00, 00, 00.

22 Q. So what you're saying is that, yes, even if it was 3
23 seconds or 2 seconds, you included it?

24 A. That's correct.

25 Q. So even if there were two calls that were a total of 5

1 seconds and had a disposition of dial error, that would be
2 included in the class?

3 A. I was retained here to offer an opinion on two or more
4 calls within a class period of telephone numbers that were on
5 Do Not Call List -- National Do Not Call List 30 days or
6 greater that were nonbusiness telephone numbers. So whether
7 it's two or more, as long as they were connected, that's what
8 my opinion is all about. The length of connection was not
9 considered in my report as long as it was greater than zero.

10 Q. And so the answer to my question is, yes, that would be
11 included in the class?

12 A. Correct.

13 Q. And you said in connection with your connected call
14 analysis, when I asked you why you did that, you said because
15 you didn't think it would be fair to include calls with zero
16 duration, right?

17 A. That's correct.

18 Q. And you didn't think it would be fair to include calls that
19 were abandoned and had less than a certain number of seconds,
20 right?

21 A. Correct.

22 Q. Okay. So you thought it would be fair to include calls for
23 2 seconds?

24 A. Absolutely.

25 Q. Okay. And you thought it would be fair to include calls

1 for 3 or 4 seconds?

2 A. Yes. It's less -- it takes less than 2 seconds to say,
3 Please do not call me, and hang up. So it is fair to include
4 connected calls that lasted greater than zero seconds.

5 Q. Okay. But you don't actually know for any of these calls
6 that anyone said, Please do not call me, and hung up. We've
7 already established that.

8 A. That's correct. I'm just explaining to the jury why, in my
9 expert opinion, it was fair to include calls greater than zero
10 seconds.

11 Q. And I just want to clarify a few things about what you're
12 not saying, okay, just so we're clear. You're not offering an
13 opinion that just because a number -- that a number is
14 residential because it happens to be on the National Do Not
15 Call Registry; is that right?

16 A. That is correct.

17 Q. Because anyone can go online and put any number into the
18 FTC system and it will go onto the National Do Not Call
19 Registry, right?

20 A. That's correct.

21 Q. And the FTC doesn't check whether it's a business number, a
22 government number or a residential number.

23 A. That is correct.

24 Q. And we talked -- a little bit before I called some numbers
25 direct inward dial numbers and I think that might have been

1 confusing. I just want to say I was talking about a direct
2 dial number where you could punch in a phone number and go
3 directly to someone's desk in an office. Did you understand
4 that was what I was talking about?

5 A. Yes.

6 Q. You don't have to go through a switchboard, right? A
7 direct dial number you don't go through a switchboard. You
8 dial directly to someone's desk.

9 A. Well, in today's technology, some switchboards are
10 automated and you can -- switchboards are used differently.
11 That methodology is used differently in various call center
12 setups, so if you could rephrase.

13 Q. Sure. Let me give you an example. So my office -- I work
14 at a law firm. We've got a lot of people that work there and
15 the main number ends in five digits. It's 5000. That goes to
16 our receptionist, okay, in my office. If someone wants to dial
17 me, they can just dial the last four numbers, 3753, and it will
18 go directly to my desk. That's what I'm talking about. They
19 don't have to talk to the receptionist first.

20 **THE COURT:** Okay. And what's your question?

21 **BY MS. ECHTMAN:**

22 Q. Do you understand that's a direct dial number that goes
23 directly to someone's desk?

24 A. Yes, I do.

25 Q. You understand that's not going through a switchboard. In

1 your view, that's going through a switchboard?

2 A. You're referring to sort of an old-fashioned way when
3 switchboard picks up the phone and connects you. It rarely
4 exists these days. But your direct telephone number would
5 still be listed on the website as a phone number. Therefore,
6 it could be listed in the directory as a business phone number.

7 Q. If my firm put my phone number on the website, it could be
8 listed, but if we didn't choose to do that -- say where it's a
9 big company like AT&T, there are a lot of people sitting at
10 their desks who have their own individual phone numbers, those
11 are not necessarily going to be on the website, right?

12 A. Correct. But I still can't comment whether they would list
13 their phone number as a work phone number on any other
14 paperwork throughout the employment with AT&T, so I can't
15 comment one way or another.

16 Q. Right, because you don't know. All right. I just want to
17 go through a few more things. Ms. Verkhovskaya, do you think
18 it's important when you're preparing an opinion for a legal
19 case that's ultimately going to be presented to a jury to do
20 your work carefully?

21 A. Yes, I do.

22 Q. Okay. And do you think it's important that you do your
23 best to get things right?

24 A. Yes, I do.

25 Q. And do you think it's important if you find mistakes that

1 you try to figure out what went wrong so that those mistakes
2 don't happen again?

3 A. Yes, I do.

4 Q. And do you think it's important if you find mistakes that
5 you correct them?

6 A. Yes, I do.

7 Q. Okay. And do you think it's important that if you're
8 writing code that the code can accurately pick up what's in
9 every particular field that it's designed to look at?

10 A. It is important.

11 Q. And do you think it's important when you're giving a
12 deposition under oath in connection with a lawsuit where you're
13 giving an expert opinion that you prepare before you go to
14 answer questions?

15 A. Yes, I do think it's important.

16 Q. Okay. And do you think it's important when you're
17 answering questions at a deposition to know what you did in
18 your work and to answer those questions accurately?

19 A. I understand where you're taking it and my apologies.

20 There was a long number of questions I was asked over many
21 hours. I was not sure when I was answering to one and I could
22 not recall the information correctly when I was answering the
23 second question. My apologies.

24 Q. And do you think it's important if you make a mistake under
25 oath at a deposition and you realize you made a mistake to

1 correct it and let folks know that you were confused and you
2 didn't understand the question?

3 A. That's what I did here today.

4 Q. Okay. Do you think it's important to do that before you
5 get up on the witness stand?

6 A. I can't answer that question.

7 **MS. ECHTMAN:** All right. Thank you, Ms. Verkhovskaya.

8 **THE COURT:** Redirect?

9 **MR. BARRETT:** Your Honor, may I obtain the microphone
10 from Ms. Echtman?

11 **THE COURT:** Yes. You would think we would have two.

12 **REDIRECT EXAMINATION**

13 **BY MR. BARRETT:**

14 Q. Ms. Verkhovskaya, you were asked a number of questions
15 about the summary page of your report. Do you recall those
16 questions?

17 A. Yes, I do.

18 Q. And there were a number of questions regarding that summary
19 page having to do with whether you offered opinions about
20 whether certain telephone numbers were residential telephone
21 numbers. Do you recall that?

22 A. Yes, I do.

23 Q. I would like to show you page 1 of your report. Do you
24 recognize that? Page 1 down there at the bottom?

25 A. Yes, I do.

1 Q. Could you -- there was a suggestion Ms. Echtman made that
2 you do not opine in your report about whether those telephone
3 calls that you identified in your report were residential,
4 right?

5 A. Correct.

6 Q. Okay. Would you please read to the jury the second
7 paragraph of the first page of the report that you provided to
8 DISH Network in this case?

9 A. "A.B. Data understands that Plaintiff alleges in" Court
10 "One of the complaint" -- Count One, sorry -- "in Count One of
11 the complaint that he and putative class members whose
12 residential telephone numbers were listed on the National Do
13 Not Call Registry, NDNCR, received two or more telemarketing
14 calls from SSN promoting the sale of DISH services during a
15 12-month period. I directed analysis of the call records to
16 identify persons who received such calls were not on NDNCR at
17 least 30 days prior to the first call and whose telephone
18 numbers were not identified as business telephone numbers or
19 numbers associated with DISH customers, per the SSN data."

20 Q. Okay. When you say, "I directed analysis of the call
21 records to identify persons who received such calls" --

22 A. Yes.

23 Q. When you say "such calls," what calls were you referring
24 to?

25 A. Calls that Plaintiff -- Plaintiff alleges in Count One of

1 the complaint that he and putative class members, whose
2 residential telephone numbers were listed on the National Do
3 Not Call Registry, NDNCR, received two or more telemarketing
4 calls from SSN promoting the sale of DISH services during a
5 12-month period.

6 Q. So did you state on page 16 of your report that your
7 analysis was directed to identifying residential telephone
8 numbers?

9 A. Yes.

10 **MS. ECHTMAN:** Objection. Leading.

11 **THE COURT:** Overruled.

12 **BY MR. BARRETT:**

13 Q. You also testified regarding your deposition and
14 Ms. Echtman asked you a number of questions about some of your
15 answers. I would like to ask you a couple of questions about
16 what has been marked as Plaintiff's 2008, down there at the
17 bottom 20,450 numbers, 57,900 calls. The question is: Were
18 those the numbers and calls that you identified in your written
19 report before you gave your deposition to DISH Network's
20 attorney?

21 A. Yes.

22 Q. And as a result of agreements between the Plaintiff's
23 counsel, between us and DISH, calls were removed from the class
24 list, correct?

25 A. That's correct.

1 Q. Okay. And the total was brought down with respect to
2 numbers. It looks like it's about 2,000 numbers were removed,
3 right?

4 **THE COURT:** We can't see the bottom of the -- if
5 you're trying to show us -- there you are.

6 **BY MR. BARRETT:**

7 Q. You go from 20,450 numbers before you sat for your
8 deposition, right?

9 A. Correct.

10 Q. And now there are 18,066 numbers, correct?

11 A. That's correct.

12 Q. So that's about a 2,000 number removal from what you
13 provided -- what you testified to at your deposition, correct?

14 A. That's correct.

15 Q. As a result not of your opinions, but as a result of an
16 agreement between Plaintiff and DISH, correct?

17 A. That's correct.

18 Q. I believe that you testified in response to some of
19 Ms. Echtman's questions that the calls on the Five9 call
20 records began May 1, 2009. Do you recall that testimony? I'm
21 sorry. 2011.

22 A. 2010.

23 Q. 2010.

24 **THE COURT:** It's been a long week. Why don't you
25 start over again.

1 **BY MR. BARRETT:**

2 Q. Okay. I believe that you testified in response to some
3 questions from Ms. Echtman that the telephone calls on the
4 Five9 records that you reviewed began May 1, 2011. Do you
5 recall that testimony?

6 **THE COURT:** 20 --

7 **MR. BARRETT:** Gosh, I did it again.

8 **BY MR. BARRETT:**

9 Q. Okay. I want to show you page 8 of your report. I'll put
10 it up on the screen. You state on page 8 -- I'm sorry, page 7,
11 that you were provided with the following data files
12 representing 1.6 million and change calls placed by SSN. Do
13 you see that?

14 A. Yes.

15 Q. And then you list the data files that you had reviewed.
16 Did you see that?

17 A. Yes.

18 Q. You state in the next paragraph these file names and the
19 calls included in them indicate that the files include calls
20 dated May 11, 2010, to August 1, 2011. Do you see that?

21 A. Yes, I do.

22 Q. So my question is: After reviewing this portion of your
23 report, do you believe that the Five9 records show calls that
24 began on May 11, 2010?

25 A. Yes, I do. I apologize.

1 Q. And finally, Ms. Echtman asked you a number of questions
2 about the MicroBilt data. Do you recall that questioning?

3 A. Yes, I do.

4 Q. And the questioning was directed at whether the MicroBilt
5 data identified some telephone numbers as being business, but
6 LexisNexis did not. Do you recall that testimony?

7 A. It included some business names, yes.

8 Q. A little bit of a difference between the MicroBilt data and
9 the LexisNexis data with respect to some numbers, correct --

10 A. Correct.

11 Q. -- on whether those numbers were business, correct?

12 A. That's correct.

13 Q. And you were asked about whether -- I believe you were
14 asked about whether you -- whether later on some of those
15 numbers that were identified in the MicroBilt data as business
16 numbers were removed from the class. Do you recall that?

17 A. Yes, I do.

18 Q. Okay. What I would like to show you is exhibit -- well,
19 this is the third stipulation regarding the class definition
20 and it has been reviewed with you by Ms. Echtman.

21 A. Yes.

22 Q. I'll put it up on your screen. Do you see a chart here
23 with highlighted 31G that says: "Numbers where line type
24 designation is always unknown for all records associated with
25 the number in the LexisNexis data and listing name in the

1 MicroBilt data appears to be a business by key words listed."

2 Do you see that?

3 A. Yes, I do.

4 Q. Is this indicating some difference between the MicroBilt
5 data about whether a telephone number was business and the
6 LexisNexis data about whether the telephone number was
7 business?

8 A. Yes. It shows that five records were identified with such
9 discrepancy.

10 Q. Five telephone numbers.

11 A. Five telephone numbers.

12 Q. And fifteen calls?

13 A. That's correct.

14 Q. And then next there's a similar category. Again, reading
15 31G(b), tell me if that is generally regarding the difference
16 between the MicroBilt data that you did not rely on for your
17 report and the LexisNexis data that you did rely upon for your
18 report.

19 A. Those are the numbers that were line type designation as
20 residential at least once in LexisNexis data and listing name
21 in MicroBilt data appears to be a business by key words listed.

22 Q. Okay. So that's a total of 12 telephone numbers where this
23 discrepancy between the MicroBilt data and the LexisNexis data
24 existed, correct?

25 A. That's correct.

1 Q. And that's twelve numbers out of how many? I'm showing you
2 Plaintiff's Exhibit 2008. Twelve numbers out of --
3 A. 20,450 numbers and 57,900 calls.

4 **MR. BARRETT:** Thank you. I have no further questions.

5 **THE COURT:** Any questions on the matters covered in
6 redirect?

7 **MS. ECHTMAN:** Yes. Just a few, please.

8 **RECROSS-EXAMINATION**

9 **MS. ECHTMAN:** If I could have the microphone.

10 **MR. BARRETT:** Yes.

11 **THE COURT:** Yes.

12 (Pause in the proceedings.)

13 **MS. ECHTMAN:** Just going back to the MicroBilt issue,
14 if I could go to the --

15 **THE COURT:** You may.

16 **MS. ECHTMAN:** And put that stipulation back on -- will
17 you turn on the screen? Okay.

18 **BY MS. ECHTMAN:**

19 Q. So if you look at -- Mr. Barrett showed you 31G, right?

20 A. That's correct.

21 Q. Okay. And then 31F is also a column that deals with
22 MicroBilt data, right?

23 A. That is correct.

24 Q. Okay. And that says records from MicroBilt data where the
25 listing name appears to be a business, based on key words as

1 listed. Do you see that?

2 A. Yes, I do.

3 Q. Okay. And there it's 52 numbers, right?

4 A. Correct.

5 Q. Okay. And those numbers all came out after your 20,000,
6 correct?

7 A. That's correct.

8 Q. Now also, Ms. Verkhovskaya, you'll recall that before the
9 lunch break I asked if you could find where in your report it
10 affirmatively said that you had offered an opinion that -- to a
11 reasonable degree of certainty, that numbers were residential.
12 You had a break to review your report, and after you came back
13 from that break, you did not show us that paragraph that
14 counsel just showed you, right?

15 A. I was focusing on rereading the summary that you pointed
16 out and I did not have sufficient time to review my entire
17 report.

18 Q. Your entire report is 16 pages, right?

19 A. That's correct.

20 Q. And you wrote it.

21 A. That is correct, quite some time ago.

22 Q. Okay. And I think we broke for maybe a half an hour,
23 right?

24 A. I don't know.

25 Q. Okay. I think the record will reflect that we broke from

1 about 11 to about 11:30; is that right?

2 A. That's correct.

3 Q. Okay. And I had asked you to read your entire report.

4 That's why you did it during the break, right?

5 A. That's correct.

6 Q. Okay. And when you came back, you didn't identify that
7 paragraph as saying that, right?

8 A. As I stated earlier, my focus was on rereading the summary
9 several times.

10 Q. Okay. And that summary was just a few paragraphs and you
11 read that several times.

12 A. Yes, I did.

13 Q. Okay. But you didn't read the rest of your report like I
14 asked you to?

15 A. I did and I missed that paragraph.

16 Q. Okay. So you didn't look at the introduction on your scope
17 of work.

18 A. I did. I just did not pick it out.

19 Q. All right. So you read it and you didn't read it the way
20 Mr. Barrett just read it to you when you read it during your
21 break? You didn't interpret it the same way as Mr. Barrett
22 just did when you read it during our break because you didn't
23 identify it for us.

24 **THE COURT:** Are you asking a question?

25 **BY MS. ECHTMAN:**

1 Q. I'm asking a question. Is that right?

2 A. Can you restate your question, please?

3 Q. Are you saying -- during the break you read that second
4 paragraph of your report that Mr. Barrett just had you read; is
5 that right?

6 A. Correct.

7 Q. Okay. And when we came back from the break, you didn't
8 identify that paragraph as affirmatively saying that it was
9 your opinion that these were residential telephone numbers.

10 A. I just stated I missed it.

11 Q. All right. Thank you.

12 **THE COURT:** Anything else?

13 **MR. BARRETT:** No, Your Honor.

14 **THE COURT:** All right. Thank you. You may step down.

15 (The witness left the stand.)

16 **THE COURT:** Further evidence for the Plaintiff?

17 **MR. BARRETT:** No, Your Honor. The Plaintiff rests.

18 **THE COURT:** All right. Ladies and gentlemen, that's
19 the end of the Plaintiff's evidence. At this time in every
20 case I always have to confer briefly with the lawyers, so I'm
21 going to ask you to go into the jury room for a few minutes.
22 Please don't talk about the case or form any opinions since you
23 haven't heard the defense evidence.

24 (The jury left the courtroom.)

25 **THE COURT:** Does the Defendant want to be heard at the

1 close of the Plaintiff's evidence?

2 **MR. BICKS:** We do, Your Honor, and we would like to
3 move for judgment as a matter of law under Rule 50. I'm
4 prepared to handle that in any fashion that the Court wants,
5 including filing a motion, which we can do on Tuesday, or I can
6 articulate right now the basis for the Rule 50 motion.

7 **THE COURT:** If you could tell me now, that would be
8 great.

9 **MR. BICKS:** Your Honor, the basis for the motion is,
10 that the Plaintiff has the burden of proof in this case to
11 prove that SSN is an agent of DISH's; and that if any calls
12 were made when SSN was an agent of DISH, that they were made
13 within the scope of authority of that agency.

14 And focusing in particular on the question of scope of
15 authority, the testimony in this case was unrebutted that DISH
16 instructed SSN in writing not to call Dr. Krakauer again; that
17 SSN responded in writing that it would not; and that accepting
18 the evidence and argument of the Plaintiff that subsequent
19 calls were made, that would be clearly and undisputedly outside
20 of the scope of authority; and that is not just based on those
21 clear instructions that are undisputed and the written
22 communications. It's outside of the scope based on the
23 contract, which expressly imposes on SSN the duty to follow the
24 laws.

25 Your Honor heard the testimony of Ms. Tehranchi, which was

1 undisputed where she acknowledged under oath that it was SSN's
2 duty to follow the law. And, as we've let into the case, Your
3 Honor characterized the theory of the Plaintiff as somehow,
4 there was a wink and a nod, and that express written
5 instructions to follow the law were overridden by some side
6 discussions, or winks and nods and things like that. There was
7 no testimony or even inference to that.

8 And I really have to focus the Court's attention on
9 Ms. Tehranchi's deposition, because that was questioning by
10 Plaintiff's counsel in -- a prior Plaintiff's counsel, but
11 they're stepping into their shoes, where a lot of that
12 questioning was asked by them. And there is no reasonable
13 inference that could go to a jury that, somehow, what SSN did
14 was within the authority that was granted to it by DISH. So
15 that's the evidence on scope of authority.

16 Backing up to the question of agency, the fundamental
17 question would be has the Plaintiff met his burden of proof to
18 prove that DISH had control over the marketing campaigns that
19 were at issue in this case?

20 And the evidence has been, particularly through
21 Ms. Tehranchi, that SSN entered into an arrangement with a
22 company called Five9. And what SSN did with Five9 was
23 completely outside of the control of anything relating to DISH.
24 That is made clear in the contracts, which SSN and DISH, the
25 parties to the contract, both agreed were independent

1 contractor relationships, not creating an agency. Both parties
2 to the contract have now said that. And, there is no evidence
3 to show that DISH had the authority to control the marketing
4 campaigns that are at issue in the case.

5 And when you, then, look at the facts where DISH was -- had
6 a contractual and clear direction that lists be scrubbed by
7 PossibleNOW, and now the evidence was that SSN got that
8 direction, and if there was any scrubbing that was not done, it
9 was expressly outside of that clear direction.

10 **THE COURT:** All right.

11 **MR. BICKS:** And that's the -- that's the basis for the
12 motion.

13 **THE COURT:** Thank you. For the Plaintiff?

14 **MR. BARRETT:** Your Honor, the standard that we have to
15 meet is a low one. The Court must find that a reasonable jury
16 would not have a legally sufficient evidentiary basis to find
17 for us. Based upon the evidence that has been presented, there
18 is a legally sufficient evidentiary basis to find for us, and
19 this is a jury question.

20 Agency, itself, is fundamentally a fact-sensitive question.
21 There is abundant evidence of what Mr. Bicks referred to as
22 wink and a nod evidence. In terms of the Court's preliminary
23 instructions, I believe, and the pattern instructions in
24 North Carolina, which the Court has reviewed, the term is
25 acquiescence. Has DISH acquiesced in the conduct of its

1 dealer, SSN? The evidence to support that is that SSN -- I'm
2 sorry -- DISH was aware of this particular marketing campaign
3 and these particular marketing tactics, aware that SSN was not
4 scrubbing. And, critically, the year before these class calls
5 began, as stated in the Assurance of Voluntary Compliance, that
6 it had the authority to control its dealers' telemarketing and
7 undertook to do so.

8 And what it responded with was what Ms. Musso described as
9 identifying the retailer. That was their method of complying
10 with the Assurance of Voluntary Compliance, to identify the
11 retailer. That's not hard to do, nor is that consistent with
12 the power and control that it stated that it had in the
13 Assurance of Voluntary Compliance.

14 So, all of that evidence, as well as other testimony,
15 reviewing the scripts for SSN, having DISH staff present, as
16 Ms. Tehranchi said, daily -- and I realize DISH has contrary
17 evidence, but Ms. Tehranchi said daily -- the uploading of
18 telephone calls, the monitoring of telephone calls, all of that
19 evidence forms a legally sufficient evidentiary basis to find
20 for the Plaintiff, and the motion should be denied.

21 **THE COURT:** All right. I'm going to deny it. I think
22 the evidence is well sufficient on agency, generally. It's a
23 bit closer on the scope, you know, acting within the scope of
24 authority issue. And I'll hear from you all again at the close
25 of all the evidence, but we'll go forward at this point.

1 I take it there will be evidence from DISH?

2 **MR. BICKS:** Yes. We have Mr. DeFranco, who is here,
3 Your Honor.

4 **THE COURT:** All right. You're ready to go forward?

5 **MR. BICKS:** We are ready, Your Honor.

6 **THE COURT:** All right. Bring the jury in, please.

7 And just to be clear, I've denied the motion. I'll hear from
8 you when you renew it at the close of all the evidence, but I'm
9 not taking it under advisement.

10 **MR. BICKS:** Understood.

11 (The jury entered the courtroom.)

12 **MR. BICKS:** Your Honor, should Mr. DeFranco take the
13 stand?

14 **THE COURT:** Just stand right there for a second.

15 All right. Ladies and gentlemen, you've heard the evidence
16 from the Plaintiffs. As I mentioned to you at the beginning of
17 the case right after you were impaneled in this matter, DISH
18 gets a turn next.

19 So DISH can call its first witness.

20 **MR. BICKS:** DISH calls Mr. James DeFranco.

21 **JAMES DEFARANCO, DEFENDANT'S WITNESS, SWORN**

22 **DIRECT EXAMINATION**

23 **BY MR. BICKS:**

24 Q. So Mr. DeFranco, you have a microphone there. And if you
25 can get it --

1 A. Testing. Can you hear me?

2 **THE COURT:** The sound system is very persnickety, so
3 if we can't hear, I'll let you know.

4 **MR. BICKS:** Thank you.

5 Q. Can I ask you, Mr. DeFranco, to please introduce yourself
6 to our jurors.

7 A. My name is Jim DeFranco.

8 Q. And tell us where you live, sir.

9 A. I live in Castle Rock, Colorado.

10 Q. And are you one of the founders of DISH?

11 A. I am.

12 Q. And tell our jury when you started DISH.

13 A. November of 1980.

14 Q. And tell us who the other founders were.

15 A. Charlie Ergen and his current wife, Cantey Ergen, at that
16 time. They weren't married yet, so it was Cantey McAdam.

17 Q. And tell us who they are.

18 A. Good friends of mine. We knew each other for a few years
19 before we got the idea to start EchoStar, which was the name of
20 the company then.

21 Q. And how long have you known Charlie and Cantey Ergen?

22 A. About 40 years.

23 Q. And tell our jury what your job is at DISH today?

24 A. I'm executive vice-president, and I'm also on the board of
25 directors at DISH.

1 Q. And tell us what parts of DISH have you managed since you
2 founded the company in 1980?

3 A. Over the years, I've had responsibility for most areas of
4 the company, but my emphasis has been in the sales, marketing,
5 and distribution and relation -- as well as relationships with
6 the retailers.

7 Q. And going back to the year 1980, tell our jury what
8 inspired you to create DISH.

9 A. Well, at that time, they didn't have small dishes like we
10 know today, so they were the big 10- or 12-foot antennas. And
11 I worked for a wholesale wine and liquor company, actually, in
12 Dallas at the time, and that's where Charlie and I met.

13 And so, we were -- I was going over to a mutual friend of
14 ours to watch a football game on a Sunday, and in the
15 neighborhood, there was one of these big dishes on a trailer.

16 And Charlie and I had discussed previously about, you know,
17 what do we think the next opportunity is in business. He
18 actually worked for Frito Lay at the time, and we thought it
19 would be something in the communications industry.

20 So I saw this dish. I had never seen one up close, so I
21 stopped the car and went. And a gentleman was in the van,
22 there was -- a trailer was behind the van, and the dish was
23 pointed at the sky, and he was actually watching a football
24 game off of satellite. And so, he was thrilled that I stopped.
25 He had just -- that was his first system that he had ever

1 gotten, and he was going to sell these systems in the state of
2 Texas.

3 And so I asked him, and we probably spent 30 or 45 minutes
4 together. And, you know, he showed me how the system worked.
5 It was like a little living room set up in the van, and so we
6 sat, watched a little football, and he showed me how it worked
7 and everything. I thought it was pretty school.

8 I asked him where the headquarters was. He said it was in
9 Sarasota, Florida. So anyway, I went -- finished, went over to
10 our friend's house and watched the game, and called Charlie --
11 that was a Sunday. Tuesday, I called Charlie and told him what
12 I saw. I said, I think we should go to look at this thing in
13 Florida. Thursday, we flew to Florida.

14 **MR. GLASSER:** Your Honor, objection. I think some
15 background is fair, but if we go at this pace, from 1980 --

16 **THE COURT:** I assume we'll go faster.

17 **MR. BICKS:** We're going to go faster.

18 **THE COURT:** All right. Go ahead.

19 Q. And was there a particular community you ended up focusing
20 on for this idea?

21 A. Well, these were expensive at the time. They ran about
22 eight to \$12,000. And naturally, it wasn't something everybody
23 could afford and that everybody needed. So we -- we knew that
24 this was a product for rural America where there was poor TV
25 reception.

1 Q. And I want to show a demonstrative I showed the jury in my
2 opening and pull that up. It's the satellite photo that I
3 showed to the jury. And I have a notebook, Mr. DeFranco, if
4 you can't see it.

5 Can you briefly describe for our jury what this is? And is
6 that you, by the way?

7 A. That's me. That was a long time ago, and this was an
8 installation -- one of our first installations probably in the
9 first six months that we were in business. And this would have
10 been out in rural Colorado.

11 Q. And how much money did you start the company with?

12 A. Our total -- the three of us, in total, started the company
13 with \$60,000.

14 Q. And if we can show a demonstrative, DeFranco 2, I showed
15 this to our jury. And tell us what this is briefly.

16 A. This is Charlie and Cantey, and this is a smaller antenna.
17 As I recall, this was probably a couple years later. And they
18 were evaluating how small an antenna that we could use and
19 still get a good signal for customers.

20 Q. And because antenna, to me, always makes me think of one
21 those kind of thin things.

22 A. Dish.

23 Q. Is that also, when you talk about a dish, is that also the
24 same thing as an antenna?

25 A. Probably for today, yes.

1 Q. And when you started DISH, who did you dream of competing
2 against?

3 A. Well, when we started, we really just were trying to
4 survive. But by the mid to late '80s, we had seen that the --
5 as the DISH size came down in size, that the market grew
6 substantially.

7 And we also had some experience in the late '80s in Europe
8 where they used a smaller antenna, not as small as here today,
9 but a smaller antenna and the market was much larger. So, we
10 actually applied for a license to be able to launch a DBS
11 service, like we have today. And we saw that Hughes also
12 applied for a license.

13 Q. And is Hughes connected to a company that many of us have
14 heard about?

15 A. Yes. Hughes -- well, it was actually DirecTV was Hughes,
16 and then Hughes was a division of General Motors at the time.

17 Q. And if we can show a demonstrative of Mr. DeFranco 3. I
18 showed this to our jury in the opening. And tell us what this
19 is.

20 A. This our first launch, which had the first satellite on top
21 of it.

22 Q. And how many launches have there been since?

23 A. We just did our 19th launch last month.

24 Q. All right. And let's talk about DISH today. How large is
25 DISH today compared to when it started?

1 A. Well, we started with three people, obviously, when we
2 got -- started. Today, we have about 16,000 employees and
3 we're a Fortune 200 company.

4 Q. And how many customers do you have today?

5 A. About 13-1/2 million.

6 Q. And how important are customer relations to DISH?

7 A. It's the most important. Obviously, if customers aren't
8 happy with our service, they have at least one choice. In
9 rural America, they could go to DirecTV. And in most cases in
10 suburban and urban America, they have multiple choices, either
11 through their cable provider, DirecTV, us, other new services
12 that are launching, like AppleTV, so on and so forth.

13 Q. And can you describe to our jury briefly what DISH's
14 business is today?

15 A. Our DISH -- our business today is primarily to provide
16 television service to the U.S. states and its territories.
17 That would be number one.

18 And number two is to design and develop product that --
19 that's in the consumer's home that enhances the customer's
20 experience in watching that service.

21 Q. And I showed this to our jury in openings, DeFranco
22 Exhibit 4, if we can bring that in, and briefly describe for
23 our jury some of DISH's products.

24 A. Well, our newest primary receiver is the hopper that has a
25 hard drive in it, so it allows you to record your programming.

1 Our newest receiver allows you to program up to 16 different
2 things at once, believe it or not. So it's -- we call it
3 conflict-free TV so the rest of the family doesn't have to, you
4 know, argue about who's going to get to record.

5 Additionally, it allows you to watch anything that you
6 would have either on your home unit or live programming from
7 your home anywhere you can get an Internet connection in the
8 world. So, if you travel, either domestically or
9 internationally, you actually -- and you have programs
10 recorded, you can do that.

11 This little thing that -- that hand is holding there
12 is called HopperGO. So that actually is a little unit that
13 allows you to wirelessly transmit some stuff from your hard
14 drive to that. Then you can actually take it with you when you
15 don't have an Internet connection, so you could take that on
16 the road, in the car, kids could watch programming in the back
17 seat so you don't have to have DVDs and those type of things.

18 Q. Let's talk about retailers. This case is about a retailer
19 called SSN. When did DISH begin working with retailers?

20 A. About six months after we started the company, so in 1981,
21 we started working with retailers.

22 Q. And how many retailers does DISH work with?

23 A. Several thousand.

24 Q. It sounds like a lot. Why so many?

25 A. Because we really need representation in every part of

1 America, right? And, obviously, it's a big country. You know,
2 consumers understand -- in general, they understand the
3 programming. They understand what ESPN and CNN and HBO is, but
4 it's really, since most other providers have similar channels,
5 certainly, the most watched channels are common. Then, really,
6 what differentiates us from the competition is how the unit
7 works in your home and whether it's easy to use for you and
8 whether it has the functionality that you like.

9 So, it's really something that's much better demonstrated
10 face to face than it is just talking to somebody on the phone
11 or seeing an ad in the newspaper.

12 Q. And can you give our jury a few examples of retailers that
13 sell DISH's products and services?

14 A. From a national retailer perspective, a company like Best
15 Buy. From an Internet perspective, Amazon carries some of our
16 product.

17 And then, from there, you can -- you know, you have
18 regional retailers. You have -- you know, I didn't actually
19 look to see where our local retailers are here, but I'm sure we
20 have some local people that may just focus on satellite. They
21 may do satellite and home security or home theater or home
22 automation or appliances or -- in fact, I would say probably
23 the local furniture and appliance place here may very well
24 carry DISH.

25 Q. And does DISH require that any of its retailers market only

1 DISH products?

2 A. No.

3 Q. Do other satellite television companies use retailers?

4 A. Yes.

5 Q. And you mentioned earlier you manage many different
6 departments. Does that include retailer operations?

7 A. Yes. I probably spent the most time --

8 Q. And during the time --

9 **THE COURT:** Wait. I'm sorry. I didn't hear the
10 answer, and if you'd be sure to let him finish before you start
11 your question.

12 **MR. BICKS:** I'm sorry, Your Honor.

13 **THE COURT:** What was your answer?

14 **THE WITNESS:** Yes. And I would say that's where I
15 spent most of my time over the years is working with retailers
16 and our distribution.

17 Q. And focusing on the time period 2010 and 2011, did you have
18 any involvement with retailers?

19 A. Yes.

20 Q. And the jury has heard testimony about marketing by
21 retailers. Did DISH do its own marketing in 2010 and 2011?

22 A. Yes, we -- yes.

23 Q. And did that include telemarketing?

24 A. Yes.

25 Q. Does DISH compete with retailers for new customers?

1 A. We do.

2 Q. And why is it that DISH and its retailers are in
3 competition with each other?

4 A. Well, while we have several thousand retailers, they don't
5 sell everywhere necessarily. Some do. Some that choose to
6 market nationally can. There isn't anything that prevents them
7 from doing it. But from a geographic perspective, the --
8 the -- historical large number of our retailers are, you know,
9 typically brick and mortar in local communities or regions of
10 the country. Obviously, we want to make sure when we advertise
11 and we have a service that's available everywhere in the
12 country that we're able to provide that service. So -- so --
13 and then from an umbrella perspective, we advertise, you know,
14 on major networks; and a typical retailer wouldn't be able to
15 run TV -- you know, run TV advertising. So it's a combination
16 that has worked out well over the years.

17 Q. And does the competition between DISH and its retailers
18 have any affect on retailers willingness to share marketing
19 strategies with DISH?

20 **MR. GLASSER:** Objection. It's somebody else's mind.

21 **THE COURT:** Well, he can testify about how the
22 business works. Move along. Go ahead. Overruled.

23 You may answer.

24 **THE WITNESS:** Generally speaking, retailers are not
25 open to providing their formulas for success in their local

1 markets on how they promote their products.

2 Q. And remind us again, how long have you worked with
3 retailers at DISH?

4 A. 35-plus years.

5 Q. And did DISH have any control -- let me back up. Do you
6 know of SSN as a retailer?

7 A. Correct.

8 Q. And did you have any involvement with SSN, particularly in
9 the beginning phases?

10 A. I certainly -- I'm sure that I met the folks from SSN and,
11 if I saw them, I might recognize them, but I can't picture Alex
12 today.

13 Q. And you said Alex. Alex is who?

14 A. He would be the principal of SSN. Tehranchi. I'm sorry,
15 his last name is Tehranchi.

16 Q. Yes. Did DISH have any control over the marketing strategy
17 of SSN?

18 A. No.

19 Q. And what about the day-to-day operations of SSN? Did DISH
20 ever have any control over day-to-day operations?

21 A. No.

22 Q. Did DISH ever want to control the day-to-day operations of
23 SSN?

24 A. No.

25 Q. Can you explain to our jury why not?

1 A. Well, it would have been impractical for us to be able to
2 manage SSN -- I mean, if it was only SSN, then it may have been
3 possible, but, again, we had thousands of retailers and so to
4 have the staff to say, oh, we can manage every facet of their
5 business on a day-to-day basis is not practical. We had a --

6 Q. And from your perspective, 36 years working in retail, who
7 did you think was best able to manage the day-to-day operations
8 of SSN?

9 A. SSN or any of the retailers were best to manage their own
10 business.

11 Q. And as -- as one of the founders of the company, did you
12 ever believe that you had the power to tell SSN what phone
13 numbers to call?

14 A. No.

15 Q. And did you ever believe that you had the authority to tell
16 SSN to call Mr. Krakauer?

17 A. No.

18 Q. Did you consider SSN to be DISH's agent?

19 A. No.

20 Q. And did DISH ever communicate that in writing to SSN that
21 it was not DISH's agent?

22 A. Yes.

23 Q. And our jury has seen Joint Exhibit 2, the retailer
24 agreement. In your 30-plus years, is that an agreement you've
25 had a lot of contact with?

1 A. Yes.

2 Q. And I'd like to pull up paragraph 11 for our jury. It's a
3 heading that's called "Independent Contractor." Do you see
4 that?

5 A. Yes, I do.

6 Q. And did you consider SSN to be an independent contractor of
7 DISH?

8 A. Yes.

9 Q. And in practice, is that how the relationship between DISH
10 and SSN actually worked?

11 A. Yes.

12 Q. All right. And did you ever hear -- and when you say Alex
13 Tehranchi, did you ever receive any information from SSN where
14 it indicated to you that it had a different understanding and
15 thought -- and said to you that they thought they were DISH's
16 agent?

17 A. No.

18 Q. And was it important to DISH that a retailer like SSN be an
19 independent contractor?

20 A. Yes.

21 Q. And can you tell our jury why?

22 A. Well, again, we started as a retailer, so we understood
23 the -- you know, what -- what type of an environment as a
24 retailer was important to us and that's one of the reasons we
25 were successful in -- in training and recruiting retailers over

1 the years, was to help them understand the product. In the
2 early days -- well, I shouldn't say that. Even if it's smaller
3 DISH's, we certainly showed them how to do installations and
4 those type of things.

5 But as an independent business person, they are
6 entrepreneurs and they have an interest of what they feel is
7 the right way to market and sell product. And I won't go into
8 all the methods of possibilities, but you see advertisements
9 everywhere, whether it's billboards, TV, radio, through the
10 mail or whatever; and a lot of retailers focus on particular
11 things, special events, county fairs, those kind of things. So
12 really, it depends -- they know their market better than we do
13 and so it's up to them to choose how they market the product
14 and the other elements of their business.

15 Q. And our jury has heard about a document called the
16 Assurance of Voluntary Compliance. Do you know what that is?

17 A. Yes.

18 Q. And was telemarketing the primary focus of that?

19 A. No, that was a small part of the agreement.

20 Q. And what was the primary focus?

21 A. The primary focus was the overall terms and conditions that
22 consumers were committing to in the course of signing up with
23 DISH Network. So, you know, some of that is terms in our
24 agreement. Some of it might be -- and it was important to us,
25 very important to us. In fact, most of what was in that

1 agreement we were doing well in advance of actually making the
2 agreement. But it was important to us that the consumer also
3 understood.

4 So it was -- as an example, when you see an ad in the
5 newspaper and there's some fine print there that says it's a
6 two-year commitment, so that would be a term and condition. We
7 wanted to be sure that it was clear on what those terms and
8 conditions should be when a customer signed up with us.

9 Q. And when it comes to consumers, as the founder -- cofounder
10 at DISH, do you believe it's a good idea for folks to know
11 about the details of the products offered?

12 A. Definitely.

13 Q. And can you tell us why?

14 A. Well, I think even as a consumer, you know, you understand
15 why, because you have to know what it is -- unless it's a
16 simple, you know, buying some chewing gum over-the-counter, you
17 know what that is. You know, our industry got to a point where
18 in most cases there was a commitment period because we invest
19 so much money to put the equipment in someone's home and so it
20 might have been a one- or two-year commitment. Well, if you
21 didn't understand what the -- what you were committing to,
22 then, you know, you might not be happy; and obviously, if
23 you're not happy, you're going to tell your friends you're not
24 happy; and not only that, you're going to call us and be upset;
25 and it doesn't make for a good relationship.

1 Q. Let me pull up the exhibit -- Plaintiff's Exhibit 55.

2 **MR. BICKS:** And if we can go to page 004 and blow that
3 up.

4 Q. I want to ask you about a couple of definitions.

5 **MR. BICKS:** Trudy, one is paragraph 2.3, authorized
6 telemarketer.

7 **THE COURT:** Plaintiff's 55 is?

8 **MR. BICKS:** It's the Voluntary Compliance Agreement,
9 Your Honor.

10 **THE COURT:** All right.

11 **BY MR. BICKS:**

12 Q. Can you see, that Mr. DeFranco?

13 A. I can.

14 Q. And for our jury, this is 2.3 of Plaintiff's Exhibit 55.
15 Can you read this to us, Mr. DeFranco, and explain to us what
16 this is talking about?

17 A. Well, it says: "'Authorized Telemarketer' shall mean a
18 business or other entity that is hired by DISH Network to
19 conduct telemarketing on DISH Network's behalf in connection
20 with the offer, sale and/or lease of DISH Network goods and/or
21 DISH Network services."

22 And what that pertains to, that would be companies that we
23 would hire to actually do our telemarketing. Sometimes they
24 would actually operate out of our building and we would
25 typically give them the numbers to call. So it would be up to

1 us to let them know what group of phone numbers to call.

2 Q. And our jury has heard the phrase "OE retailer" and that
3 SSN is an OE retailer. Is that -- is that your understanding?

4 A. SSN is an OE retailer.

5 Q. And is an OE retailer an authorized telemarketer as is
6 described there?

7 A. No.

8 Q. Can you explain why not?

9 A. Because the OE retailers, including SSN, would make their
10 own determination on who should call and what numbers they
11 should call and they'd be operating out of their own facilities
12 and basically control their own operation.

13 Q. And if we can look at the definition on page 8, 2.15.

14 **MR. BICKS:** And highlight that for us, if you will,
15 Trudy.

16 **BY MR. BICKS:**

17 Q. Mr. DeFranco, do you have that in front of you?

18 A. I do.

19 Q. And can you read that to our jury and explain to us what
20 this is referring to?

21 A. So "'Third-Party Retailer' shall mean one or more
22 independent persons, a corporation, a partnership or any other
23 type of entity, as the case may be, that is authorized by DISH
24 Network to offer, lease, sell, service, advertise, and/or
25 install DISH Network services and/or DISH Network goods."

1 Q. All right. And you see the -- does that refer to a
2 company, a retailer like SSN?

3 A. This does refer to SSN and other retailers, yes.

4 Q. And there's a word in there called -- it says
5 "independent." Do you see that in the first line?

6 A. I do.

7 Q. And can you explain to us the purpose of that here and how
8 it applies to an OE retailer like SSN?

9 A. Similarly to what we talked about earlier, they are the
10 business owner. They run their own business. They make their
11 own decisions on who they hire, who they fire, how they market,
12 basically everything within their business that relates not
13 only to how they market DISH products, but other products and
14 how they choose to run their business.

15 Q. And in practice, is that how things worked?

16 A. Yes.

17 Q. All right. And if we can go back to paragraph -- I think
18 you mentioned this.

19 **MR. BICKS:** 4.79 of this, Trudy.

20 Q. It talks about discipline. Do you see that, 4.79? It
21 talks about a whole series of things. Do you see that?

22 A. I see that.

23 Q. And prior to this agreement, were those forms of discipline
24 the kinds of things that were permitted in the way that DISH
25 did business with its OE retailers?

1 A. Yes. I mean, when you say "permitted," this was our
2 process prior to this agreement.

3 Q. Yeah. And what I mean is, is this the way a business
4 worked in the real world?

5 A. Yes. This is how we operated even prior to the agreement
6 as it related to telemarketing.

7 Q. Does DISH's agreement consider these different types of
8 discipline mean to you that DISH had control over a retailer
9 like SSN and how they marketed?

10 A. No.

11 Q. Can you explain why not?

12 A. Well, basically, you know, this would be a category that --
13 obviously, as I mentioned earlier, the customer is very
14 important. We have to make sure that the customer is, you
15 know, being treated fairly and communicated with properly and
16 that their installation is done correctly for the retailers
17 that are doing installations and so on and so forth because
18 ultimately they're going to look to us, meaning the consumer,
19 for their satisfaction and so on and so forth.

20 And while we had this process here in this agreement for a
21 list of ways to -- to investigate and -- and actions to take
22 with retailers, it was their choice on whether they wanted to
23 do that or not. I mean, if they -- if we had discussions with
24 them and said, "We think that in this case that you, you know,
25 should retrain your employees," as an example, or any number of

1 things, and they said, "No, I don't want to do that," then
2 their alternative would be not to do business with us. But, it
3 was their choice.

4 Q. And when it came to the telemarketing laws as between DISH
5 and SSN, who was responsible for making sure that SSN complied
6 with the telemarketing laws?

7 A. SSN.

8 Q. And did DISH ever communicate that to SSN?

9 A. Yes.

10 Q. And how was that communicated?

11 A. One way was through the retailer agreement.

12 Q. And did DISH ever remind SSN of that obligation beyond the
13 retailer agreement?

14 A. Yes.

15 Q. And the jury has heard about fact blasts already, but tell
16 our jury what retailer chats are.

17 A. Retailer chats were another way for us to communicate with
18 our retailers. And, again, we had the technology to be able to
19 broadcast, so we would authorize their showroom units so they
20 could receive a closed broadcast, so to speak, so our consumers
21 wouldn't be able to tune to a channel and see it; and that way
22 we could have live communication with the retailers. They
23 could call in and ask questions, and we would talk about either
24 our new promotions or new procedures or whatever was happening
25 in the business as it related to the retailers.

1 Q. Did you -- well, did SSN have access to retailer chats?

2 A. Oh, absolutely.

3 Q. And did you ever appear in these retailer chats yourself?

4 A. I did for quite some time.

5 Q. And I want to show you Defendant's Exhibit 3, a retailer
6 chat script.

7 **MR. BICKS:** I'd move it into evidence.

8 **MR. GLASSER:** No objection, Your Honor.

9 **THE COURT:** It will be admitted.

10 **BY MR. BICKS:**

11 Q. If we can pull that up. Do you recognize this document,
12 Mr. DeFranco?

13 A. Yes, this is a retailer chat script.

14 Q. And did you actually appear yourself in this retailer chat?

15 A. I did.

16 Q. And tell our jury when it took place.

17 A. January 16th, 2007.

18 Q. And does this script accurately reflect what you said
19 during that chat?

20 A. I expect that it does, though I don't have it all in front
21 of me here.

22 Q. All right.

23 **MR. BICKS:** Can we go to page 47 of the script?

24 Q. And so we're clear what this is, this is actually when
25 you're actually on -- are you on a script where people see you

1 live or are you talking and they hear you without seeing you?

2 A. No, it's audio and video.

3 Q. And on page 47, you see that there's reference there at the
4 top -- if we can blow that up, Trudy.

5 It talks about the telemarketing laws, right?

6 A. Correct.

7 Q. And can you tell us what your purpose is as one of the
8 founders to be on a retailer chat communicating this
9 information?

10 A. Well, this was very important to us and, as we also knew,
11 very important to the retailers, though some may have
12 understood it more than others at the time. But we wanted to
13 make sure all retailers understood it even if they weren't in
14 the -- in the -- you know, hadn't chose to do telemarketing as
15 one of their acquisition approaches. But in case they did,
16 they needed to make sure that they understood how serious we
17 are about following the laws as it related to telemarketing.

18 So this -- actually, this top part here is a slate that we
19 would have put up kind of like you did on this screen that they
20 would have been able to see and then the talking points are
21 underneath that on how we talked about each of the items.

22 Q. And as one of the founders, is -- is compliance with the
23 telemarketing laws by the retailer, is that something that was
24 important to you?

25 A. Very important.

1 Q. And tell our jury why.

2 A. Again, it goes back to the consumer. If a consumer is on a
3 Do Not Call Registry, went out of their way to actually
4 register that they didn't want to get a phone call, then
5 immediately when they got a sales call for any product they
6 weren't going to be -- that wasn't going to be a productive
7 call or likely to be a productive call. So, you know, we
8 believe that our first impression is very important with a
9 customer and that's not the right way to start a relationship.

10 **MR. BICKS:** And if we can scroll down, Trudy, to the
11 fifth bullet point. It says here -- and maybe we can make it a
12 little easier for our jury to read.

13 Q. EchoStar -- and tell our jury again EchoStar and its
14 relationship to DISH.

15 A. DISH is the brand, and today, DISH is the actual company.
16 EchoStar was the company at the time.

17 Q. All right. And it says here that EchoStar takes
18 telemarketing violations very seriously, and we work with law
19 enforcement officials at all levels to identify those in
20 violation of this policy.

21 Was this true?

22 A. Absolutely.

23 Q. And tell our jury why this is here and what kind of things
24 were done.

25 A. Well, I mean, any -- any times that we would hear about any

1 kind of a problem relating to telemarketing, regardless if it
2 was from -- directly from a customer or if it was from a law
3 enforcement agency, we would make sure that we determined what
4 caused that, where it came from, invest -- you know, did an
5 investigation.

6 Q. And the next bullet point says: Failure to comply with
7 applicable laws could, among other things, lead to termination
8 of your retailer agreement, subject you to criminal and civil
9 liability, and obligate you to defend and indemnify EchoStar in
10 any civil or criminal lawsuit.

11 This seems like a strong message. What's going on here and
12 why is this being conveyed?

13 A. It was a strong message because it was meant to be strong.
14 We actually did terminate retailers as a result of it, and we
15 wanted to make sure retailers knew that, you know, that -- that
16 we took it seriously.

17 Q. And did you, as one of the cofounders, ever consent in any
18 way to SSN violating the telemarketing laws?

19 A. No.

20 Q. And did DISH make SSN responsible for telemarketing
21 compliance to shield itself from responsibility?

22 A. No.

23 Q. And explain why not.

24 A. Well, we took responsibility for our -- we did
25 telemarketing, and we took responsibility for our

1 telemarketing. But, it was impossible for us to operate within
2 their four walls or through whoever they chose to do business
3 with to assist them if -- if, at all, they chose to do
4 telemarketing. But if they did, then they needed to understand
5 what the local, state, and federal laws were and make sure that
6 they were adhering to them. I mean, I guess that's the answer
7 there, yeah.

8 Q. And are you familiar with something called the Robocall
9 Task Force?

10 A. Yes.

11 Q. Our jury has heard in other -- from other witnesses,
12 automated dialers, Robo calling. Explain to our jury what the
13 Robocall Task Force is and DISH's role.

14 A. Last year, the FCC recognized that it's a big problem, and
15 that it's not just a domestic problem, that many of these calls
16 come from other countries.

17 **MR. GLASSER:** Objection, relevance. Last year? The
18 year 2016?

19 **THE COURT:** Yeah, okay. Sustained.

20 **MR. BICKS:** I'll move on.

21 **BY MR. BICKS:**

22 Q. Based on your experience, Mr. DeFranco, what is the effect
23 of calls like the ones that SSN is claimed to have made in this
24 case on DISH's reputation with customers?

25 A. Not good.

1 Q. And was DISH's reputation important in 2010 and 2011?

2 A. Yes.

3 Q. And how does DISH's reputation affect its ability to
4 compete for new customers?

5 A. Again, it goes back to the consumer. I mean, if -- if we
6 were to have a reputation from any respect that wasn't -- if we
7 continued to try and improve every day in every area of our
8 business of customer service, and, obviously, always follow
9 whatever regulations and laws are in place, but, from a service
10 perspective, the better our reputation is with the consumer,
11 the more likely they are to tell their friends, neighbors,
12 relatives about us and have us -- have them choose us versus
13 the competition.

14 Q. Would DISH and was DISH willing to risk its reputation with
15 consumers to increase activations?

16 A. No.

17 Q. And why not?

18 A. Because everything we do is from a long-term thinking
19 perspective. And that would be a very short-term -- you know,
20 if you said, oh, gee, I don't care, I want to, you know,
21 increase activations in the month of July, well, maybe you
22 could increase activations in the month of July. But, the same
23 people that started the company run the company today. And
24 everything that we've done historically is always thinking
25 about not what's important just next week or next month, but

1 five years from now.

2 And that's when a reputation really matters is, as an
3 example, I mean, going from big dishes to small dishes. I
4 mean, if we didn't have a good reputation in the big dish
5 business, we wouldn't have been successful in the small dish
6 business.

7 As we launch other new products, if we have a bad
8 reputation in the DBS video business, then it's not likely a
9 customer would want to do business with us in whatever that
10 other business might be.

11 Q. And based on your experience in 2010 and 2011, did DISH
12 profit from SSN's telemarketing calls marketing DISH services
13 to individuals on the Do Not Call List?

14 A. I don't believe so.

15 Q. And do you know how many of DISH's new activations in 2010
16 and 2011 came from SSN?

17 A. I have a general idea.

18 Q. And tell us what that is.

19 A. It was a small percentage of the total activations, so, you
20 know, a fraction of one percent.

21 Q. And based on your experience, was someone who puts their
22 telephone number on the National Do Not Call List, but receives
23 a telemarketing call from SSN trying to sell DISH service, are
24 they likely to sign up with DISH?

25 **MR. GLASSER:** Objection. There's absolutely no

1 personal knowledge for that question.

2 **THE COURT:** Well, he can testify based on his
3 experience and the jury will evaluate it. You all can talk
4 about it in closing argument. Go ahead.

5 **BY MR. BICKS:**

6 Q. And I don't mean to ask the direct question. Is this
7 something that you know based on 35 years experience?

8 A. It certainly is, yes.

9 Q. And is there any element of speculation or guesswork in the
10 answer to that question?

11 A. No.

12 Q. What's the answer?

13 A. Overall, the company would not profit from calls that were
14 made to consumers who chose not to get phone calls. I mean --

15 Q. And if a consumer whose number is on the National Do Not
16 Call List received a call from SSN and signs up, is that likely
17 to be profitable for DISH?

18 A. Again, from an overall perspective, not likely.

19 Q. And why does it cost DISH money when a new customer signs
20 up?

21 A. We have the expense of going out to the home and putting
22 the equipment in the home. Used to be years ago, in the late
23 '90s, when DirecTV and us first started, the consumer actually
24 purchased hardware. But, realistically, to complete with
25 cable, cable didn't charge for hardware on an upfront basis.

1 So, the business evolved to where, basically, today and in that
2 time frame, if you signed up for DISH Network or DirecTV, we
3 would put DISH Network -- in my case, DISH Network, we would
4 put DISH Network hardware in your home. We'd have to pay an
5 installer to come out and actually do the installation.

6 And then, usually, there was some type of an introductory
7 promotion. And, certainly, there was value to that. In many
8 cases, it had to do with discounts in the programming. So it
9 might cost an extra few hundred dollars to -- for the
10 programming discounts.

11 Q. And what happens if someone signs up for DISH and they
12 terminate their services in a year or two later?

13 A. If they term -- it typically takes us about three years to
14 break even on a customer who signs up. So, if it was less than
15 three years, we'd lose money. If it was more than three years,
16 we'd make, you know, a little bit of incremental money each
17 month if they continue.

18 Q. And in 2010 and 2011, did DISH view telemarketing calls,
19 like the ones SSN allegedly made in this case, as good for its
20 business?

21 A. No.

22 Q. And can you give an example of how telemarketing violations
23 hurt DISH's business?

24 A. Well, the fact that we're here today is --

25 **THE COURT:** I'm sorry. Say again.

1 **THE WITNESS:** The fact we are here today in a
2 courtroom, Your Honor, is one reason.

3 **BY MR. BICKS:**

4 Q. And in your experience in dealing with retailers, like a
5 retailer like SSN, if you see a handful of complaints over a
6 year or two, is that typically a basis to terminate a retailer?

7 A. Well, it depends on the purpose of the -- you know,
8 where -- what -- what the -- what the issue was around the
9 complaints. If -- you know, if there were -- there are many
10 factors that go into an investigation and what action should be
11 taken with the retailer.

12 Q. And does DISH -- and are you aware of whether or not DISH
13 investigates complaints and did so when it related to SSN?

14 A. Definitely.

15 Q. And tell our jury how you think DISH handled things.

16 A. Well, you take the information, which is the complaint, and
17 in some cases -- well, in most cases, it wasn't simple, meaning
18 that you had to -- you know, the customer who complained
19 typically got a phone call, may have wrote down who it was
20 from. But, sometimes, people making those calls didn't
21 represent themselves as who they were, so -- and then, sometimes,
22 the Caller ID didn't necessarily represent where it came from.
23 So they might write down the Caller ID number, but that might
24 not relate to the actual place where it happened.

25 So -- but in any event, to try and get through this, I

1 mean, you'd have to really do a thorough investigation. So
2 you'd have to start with where did the complaint come from, how
3 much information do we have? Sometimes, we would have to call
4 the consumer back and talk to them about the issues relating to
5 that, and then work down the line to figure out what happened.

6 And to take it to its full extreme, sometimes, we would
7 actually have to have one of our employees call the number,
8 sign up as a customer, and then, at that point, we knew who the
9 retailer was, because at that point, we know that they actually
10 inputted an order. And that, we had no problem tracking. But
11 if it was just a phone call, it was more difficult to find out
12 how that call was initiated and who initiated.

13 So was that thorough enough?

14 Q. That's for the jury, not for me. You testified earlier
15 about the retailer agreement, facts blast, retailer chats in
16 which DISH says that telemarketers like SSN were responsible
17 for complying with telemarketing laws. Do you remember that,
18 generally?

19 A. Yes.

20 Q. All right. If SSN called Mr. Krakauer or any other
21 consumer whose number was on the National Do Not Call Registry,
22 would that have been consistent with DISH's direction?

23 A. Quite the contrary. If they were on the Do Not Call List,
24 we would have not wanted a retailer to call someone on the Do
25 Not Call List.

1 Q. And the jury has heard that SSN has signed up with
2 PossibleNOW. Do you know what PossibleNOW is?

3 A. I do.

4 Q. And just tell our jury who they are.

5 A. PossibleNOW is a company that was recognized as the leader
6 as it related to the Do Not Call Registry and being able to
7 have an accurate database and being able to, you know, scrub
8 phone numbers against that registry. And so, we actually
9 recommended to retailers that they use PossibleNOW, and we used
10 PossibleNOW, if they were going to do any telemarketing as a --
11 as a mechanism to scrub phone numbers for the Do Not Call List.

12 Q. And if a retailer like SSN was not using PossibleNOW, would
13 that have been against DISH's direction?

14 A. We did suggest that people use PossibleNOW, that's correct,
15 to all -- SSN and other retailers.

16 Q. And you, in 35 years, have had to deal with difficult
17 situations of terminating retailers; right?

18 A. Yes.

19 Q. Is the decision to terminate a retailer one that you, as
20 one of the founders, take lightly?

21 A. Not at all.

22 Q. And tell us why.

23 A. These are, again, as I talked earlier, they vary in size,
24 but the majority, the volume of them are independent -- well,
25 they're all independent, but are small independent business

1 people that may carry other products but may not carry other
2 products besides DISH. So -- but, certainly, if they were
3 making an effort to market DISH, typically, I mean, unless it
4 was, obviously, a company like Best Buy or Amazon that has, you
5 know, many other products, we're a very small fraction of what
6 they do. But, in the years that we're talking about and in the
7 categories of the volume of retailers that we're talking about,
8 it would have had an impact on their business.

9 And we -- we cared about our retailers, very much so. And
10 so, we wanted to make sure that we were making the right
11 decisions and that we took the proper steps and communicated
12 with them on what they were doing in any way that we could, you
13 know, give them some knowledge in how to do better.

14 **THE COURT:** How much longer?

15 **MR. BICKS:** I'm done.

16 **THE COURT:** Oh. All right. Then we'll take our
17 afternoon recess.

18 **MR. GLASSER:** Yes, ma'am.

19 **THE COURT:** The witness can step down.

20 (The witness left the stand.)

21 **THE COURT:** All right. Ladies and gentlemen, I'll
22 excuse you for the afternoon break. Please remember not to
23 discuss the case among yourselves or with anyone else. Don't
24 form any opinion about the matter. Keep an open mind and don't
25 have any contact with the lawyers, parties, or witnesses.

1 Come back to the jury room in 15 minutes, about 3:45.

2 (The jury left the courtroom.)

3 **THE COURT:** I wasn't trying to rush you. I was just
4 trying to find a good time to take a break, but you were done?

5 **MR. BICKS:** Yes, I was done.

6 **THE COURT:** Okay. And how long are you anticipating
7 the cross?

8 **MR. GLASSER:** We'll be done with him today, Your
9 Honor.

10 **THE COURT:** Say again.

11 **MR. GLASSER:** We will be done with him today,
12 half-hour.

13 **THE COURT:** Half-hour or so? All right. Who is your
14 next witness going to be?

15 **MR. BICKS:** He's really our last one that we have here
16 now.

17 **THE COURT:** Okay.

18 **MR. BICKS:** I mean, I figured he's going to go until
19 4:15ish.

20 **THE COURT:** All right. Anything before we take our
21 recess?

22 **MR. BICKS:** Not from me, Your Honor.

23 **MR. GLASSER:** No, ma'am.

24 **THE COURT:** No? Take a 15 minute recess.

25 (An afternoon recess was taken from 3:35 p.m. until

1 3:45 p.m.)

2 **THE COURT:** Okay. I think we have all the jurors; is
3 that right?

4 **THE CLERK:** Yes, ma'am.

5 **THE COURT:** Anything before they come in?

6 **MR. GLASSER:** Yes, ma'am. I would like to just go
7 over two items to get a court ruling in advance. The first is,
8 obviously, the witness has approximately \$207 million worth of
9 stock that he beneficially owns, and I believe that goes to
10 bias, so I'm going to get into that.

11 **MR. BICKS:** I would object to that, Your Honor.

12 **THE COURT:** Based on?

13 **MR. BICKS:** Its relevance and prejudice. I've already
14 said he's on the board. He's one of the founders of the
15 company, and it's -- it's --

16 **THE COURT:** All right. Well, you can certainly ask
17 him if he owns stock, and I don't know that the specific amount
18 is -- is relevant. If you'll -- you can ask him some general
19 question like many millions.

20 **MR. GLASSER:** All right.

21 **THE COURT:** But I don't know that the specific amount
22 is necessarily --

23 **MR. GLASSER:** The reason, Your Honor, I think the
24 specific amount should be admissible is that he basically came
25 in and just, you know, at a very high level came over and just

1 blessed DISH and blessed, you know, their own operations and
2 said these retailers are out there in the world and purported
3 to have a lot of personal knowledge about SSN's operations that
4 I don't think -- that I think his bias goes to why he might
5 have said those things, and so I think it's classic bias.

6 **THE COURT:** I don't disagree with you. I mean, I'm
7 going to let you ask him.

8 **MR. GLASSER:** Okay.

9 **THE COURT:** I just don't know that the specific amount
10 is particularly relevant, and that does have the potential to
11 be a bit unfair, but you can -- you can ask him about it and
12 get a general range from him.

13 **MR. GLASSER:** Second, Your Honor, the witness
14 testified that they take responsibility for their own TCPA
15 violations, and, of course, from 2007 to 2010, Judge Myerscough
16 found that they had 1.7 million violations of their own in the
17 same exact period leading up to what's issued here -- there's
18 some overlap in the class period -- and then also 2.3 million
19 other violations, so about 4 million violations.

20 So I think I should be able to ask him a few questions on
21 that because it follows from the fact that DISH itself was not
22 policing itself as well as it should, that it might not be
23 policing its retailers as well as it should, and he opened the
24 door.

25 **MR. BICKS:** First of all, Your Honor, you've ruled

1 that that was inadmissible. Second of all --

2 **THE COURT:** Well, yeah, that was before he came in
3 here and told me and the jury that they don't violate the law.

4 **MR. BICKS:** The second -- well, he said they take
5 responsibility. The second thing is Judge Myerscough hasn't
6 made a final determination about those violations, whether
7 they're knowing violations under the telemarketing clause. So
8 there's no basis to examine him about that.

9 **THE COURT:** Which order of hers are you talking about
10 asking him about?

11 **MR. GLASSER:** He said on direct that they take
12 responsibility for their own TCPA violations. So I'm going to
13 say, so you take responsibility for the 1.7 million violations
14 your company was found to have committed from 2007 to 2010 in
15 this time period; isn't that right?

16 **MR. BICKS:** Right, and that's even -- that's actually
17 a different claim in that case as well, Your Honor, and it's
18 not a final determination on that particular point. So I was
19 pointing him to parts of a contract and how they're different,
20 and that part of the contract that I was actually talking about
21 has to do with a completely different issue, by the way, than
22 the one that is at issue in Illinois. It's not a final
23 determination, among other things.

24 **THE COURT:** So -- so what is it, Mr. Glasser --

25 **MR. GLASSER:** So he said he takes responsibility for

1 his own violations. I'll ask him. He can either take
2 responsibility or he can back -- he can crab-back on his
3 testimony.

4 **MR. BICKS:** DISH isn't even alleged in this case to
5 have violated the telemarketing laws. It's a completely
6 different issue. This is an issue involving SSN as an agent,
7 and that's what this case is about. He's talking about
8 something completely different, which is not a final
9 determination, and it's a different statute. That's what we
10 were trying in Illinois. It hasn't even been determined, and
11 regardless of what would happen, it'll likely be appealed and
12 it's --

13 **THE COURT:** I guess I'm just having a little trouble,
14 Mr. Glasser, understanding exactly why the -- I mean, the way
15 you are telling me you want to do it --

16 **MR. GLASSER:** So the witness will say, yes, I take
17 responsibility, DISH does, or the witness will say, no, DISH is
18 still fighting about that, in which case, it's not true that
19 they want to take responsibility; they want to fight about all
20 their own violations or alleged violations. Either way, I
21 don't care what the answer is, that what he said on the witness
22 stand is either true or not true, either they take
23 responsibility or they don't, and he can have it either way he
24 wants it.

25 **THE COURT:** Okay, but the under -- the underlying

1 premise of how many violations there are --

2 **MR. GLASSER:** -- has already been found by a court and
3 was not disputed by DISH that those calls were made, and he can
4 say we're going to appeal that or whatever he wants.

5 **THE COURT:** Where are you -- I thought I asked you
6 this. Where is that in her order?

7 **MR. GLASSER:** It's on page -- it's on page 3, Your
8 Honor.

9 **THE COURT:** Is that the same order you already handed
10 up to me?

11 **MR. GLASSER:** Yes.

12 **THE COURT:** I don't know what happened to it,
13 Ms. Sanders.

14 **THE CLERK:** He looked at it. He needed it.

15 **THE COURT:** Oh.

16 (Document handed to the Court by Mr. Glasser.)

17 (Pause in the proceedings.)

18 **MR. GLASSER:** I'm not proposing to show the jury the
19 opinion.

20 **THE COURT:** I'm sorry? Say again.

21 **MR. GLASSER:** I'm not proposing to show the jury the
22 opinion or anything.

23 **MR. BICKS:** Your Honor, again, you've now been shown
24 one page out of about a 280-page ruling, and I can tell you
25 that that case does not involve -- that claim right there does

1 not involve the TCPA. It involves something called the TSR,
2 and we're litigating in that case whether or not there was any
3 kind of a knowing finding; in which event, there may not even
4 be any kind of a penalty, and that's what we're litigating.
5 That's under adjudication before Judge Myerscough, but under --

6 **THE COURT:** Okay. I mean, I remember -- I mean, I've
7 kept up with that litigation, obviously, but it's --

8 **MR. GLASSER:** They're both Do Not Call violations,
9 Your Honor.

10 **THE COURT:** They're Do Not Call violations, and it's
11 specific -- she's specifically saying calls to telephone
12 numbers on the National Do Not Call Registry.

13 **MR. GLASSER:** Yeah.

14 **THE COURT:** I guess, you know, he has come in here and
15 painted this picture, and the Plaintiff is allowed to go -- to
16 cross-examine him about that. I'm a little concerned about
17 exactly how you're proposing to do it.

18 **MR. BICKS:** And, Your Honor, just again, in terms of
19 what he said -- and we can pull up the transcript. He said
20 that he takes responsibility for DISH's telemarketing. He
21 didn't say anything about telemarketing violations and --

22 **THE COURT:** I'm -- I mean, don't you think that's -- I
23 mean, we were all sitting here. We all heard his testimony.
24 He -- as Mr. Glasser says, he paints a glowing picture. You
25 can parse it however you want. He's entitled to cross-examine

1 him about it.

2 **MR. BICKS:** Right, but you can't -- Your Honor, you
3 already ruled --

4 **THE COURT:** Well, I ruled on it before somebody --
5 before he came in here and said, we don't violate the
6 telemarketing laws and we take responsibility -- you know, I
7 don't know -- I don't remember his words.

8 **MR. BICKS:** Well, he didn't say that.

9 **THE COURT:** I remember his message. His message is we
10 take it seriously. We don't violate the laws. You know,
11 that's basically what said. So, you know, they're entitled to
12 undermine that to some extent. I -- you know, I'm going to let
13 you ask some questions about it if it -- but --

14 **MR. GLASSER:** Okay.

15 **THE COURT:** -- you're going to need to be careful
16 about how you do it because I do think there's some potential
17 for unfair prejudice about that.

18 **MR. GLASSER:** We have nothing else, Your Honor.

19 **THE COURT:** All right. Anything else?

20 **MR. BICKS:** No.

21 **THE COURT:** All right. You can bring the jury in.

22 **MR. BICKS:** Your Honor, I should also just -- as folks
23 are pointing out to me something, Judge, that there's a
24 reconsideration motion on that has changed some of that. I'm
25 just saying -- I'm just alerting the Court he doesn't know what

1 happened in that case. I'm just telling you, and I've told you
2 it was a different statute; and if we start to get into that,
3 it's going to be inaccurate.

4 **THE COURT:** It's going to be what?

5 **MR. BICKS:** Inaccurate.

6 **THE COURT:** Well, the witness can correct if we -- I
7 would hope that Mr. Glasser would do it in a way that's
8 reasonable. If not, you can correct it.

9 (The jury entered the courtroom.)

10 **THE COURT:** All right. The witness can come back up
11 to the witness stand.

12 (The witness returned to the witness stand.)

13 **THE COURT:** Okay. Go ahead.

14 **CROSS-EXAMINATION**

15 **BY MR. GLASSER:**

16 Q. Mr. DeFranco -- oh, is this on? Mr. DeFranco, isn't it
17 fair to say that DISH Network is personally very important to
18 you?

19 A. Yes.

20 Q. You've spent many years building DISH Network yourself,
21 right?

22 A. Yes.

23 Q. You have a great deal of personal wealth tied up in DISH
24 Network, right?

25 A. Yes.

1 Q. You have millions of shares of stock in DISH Network,
2 right?

3 A. Yes.

4 Q. And that amounts to millions and millions of dollars,
5 doesn't it?

6 A. Yes.

7 Q. So it's fair to say that you're biased in favor of DISH
8 Network?

9 A. That hasn't affected my testimony.

10 Q. Okay. You don't think that when you look at a problem,
11 say, telemarketing violations, you like to see it through the
12 best DISH prism that you can?

13 A. No. If we have any kind of an issue that's negative to
14 DISH, I try and look at it on its face and take corrective
15 action.

16 Q. Okay. You talked a little bit on direct examination about
17 your understanding of investigations in the compliance
18 department.

19 A. Yes.

20 Q. Do you remember that testimony? So is it your belief that
21 your compliance department affirmatively investigated consumer
22 complaints against national sales partners to determine if they
23 were legitimate?

24 A. Yes.

25 Q. What does a consumer pay on average for a DISH subscription

1 in a month?

2 A. On average, about \$80.

3 Q. Okay. So Amir Ahmed said 90. Was he right, or are you
4 right?

5 A. Well, it depends on when you -- you know, what the timing
6 is of the question, but we do --

7 Q. From 2010 to 2011?

8 A. I don't recall exactly what it was in 2010 to 2011.

9 Q. Directionally around 80s?

10 A. Yes.

11 Q. And I understand from an exhibit in this case that in 2011
12 there were 45 national sales partners on the OE tool. Is that
13 directionally consistent with your memory?

14 A. It sounds about in the vicinity, yes.

15 Q. Okay. And your lawyer showed you this Assurance of
16 Voluntary Compliance. Do you remember that?

17 A. Yes.

18 Q. And he asked you to look at a couple of definitions, right?

19 A. Yes.

20 Q. I want to show you another definition.

21 **THE COURT:** Can you just restate the exhibit number?

22 **MR. GLASSER:** It's Exhibit 55, Your Honor. I'm on
23 page 6. Oh, may I publish to the jury? It's been admitted.

24 **THE COURT:** Yes.

25

1 Q. It says here at Section 2.9, that there's a third -- you
2 know, not authorized telemarketer, not --

3 **THE COURT:** Slow down.

4 Q. There's a third definition called covered marketer. Do you
5 see that definition?

6 A. I do.

7 Q. All right. And a covered marketer, do you agree with me,
8 is a third-party retailer who can directly enter sales into
9 DISH's order entry application system, OE retailer, right?

10 A. That's one category, correct.

11 Q. And that's those 45 retailers of which Satellite Systems
12 Network was one, correct?

13 A. Correct.

14 Q. I'm showing you Exhibit 70, which is an e-mail that we went
15 over yesterday with Reji Musso. Okay. And it says here that
16 PossibleNOW was offering a Tier 1 compliance survey of federal,
17 state, and DISH Network corporate compliance guidelines at a
18 thousand dollars per authorized retailer. Do you see that?

19 **MR. BICKS:** Your Honor, I would object on foundation.
20 There's no foundation. He's not --

21 **MR. GLASSER:** It's admitted already.

22 **THE COURT:** Don't interrupt each other.

23 **MR. BICKS:** I was saying there's no foundation for
24 questioning of him on this document.

25 **THE COURT:** Okay. You may need to lay a foundation,

1 don't you think?

2 Q. Well, on direct examination, you said that you were -- that
3 your area of expertise in the company was retailers, right?

4 A. Yes.

5 Q. You said that you did most of your work on the retail side,
6 right?

7 A. Among other things, but over the years, yes.

8 Q. You said you met SSN's Alex Tehranchi, right?

9 A. I believe I did.

10 Q. You offered some opinions about how people would react to
11 SSN calling them, right, which are opinions about retailer
12 performance on direct examination, right?

13 A. Yes.

14 Q. So it's -- so I'd like to ask you about the costs of the
15 Tier 1 compliance survey for authorized retailers, okay?

16 **MR. BICKS:** Your Honor --

17 Q. Were you involved in the decision not to do this?

18 **MR. BICKS:** Objection, no foundation.

19 **THE COURT:** Well, he can answer, if he was involved or
20 not.

21 Q. Were you involved in the decision not to pay this?

22 A. I mean, you're pointing at one line. I have to look at the
23 larger document to understand -- you know, to try and get a
24 frame of reference here.

25 **THE COURT:** Do you want to hand him the whole copy so

1 he can take a look at it if you're going to ask him about it?

2 Q. So Reji Musso talked about this yesterday and said that
3 DISH declined to do it. I'm asking you, were you involved in
4 that decision?

5 **MR. BICKS:** Your Honor, I object to describing what
6 somebody else said. He wasn't here.

7 **THE COURT:** Okay. Well, the jury will remember the
8 testimony.

9 (Document handed to the witness by Mr. Glasser.)

10 (Pause in the proceedings.)

11 **THE WITNESS:** Okay. I understand better what it is.

12 Q. All right. Were you involved in the decision not to do
13 this, not to accept this bid?

14 A. I was not.

15 Q. Okay. Were you aware of the decision not to implement this
16 plan?

17 A. Not as I recall today.

18 Q. All right. Would you agree with me that the Tier 3 plan
19 here proposed a certification program for certification of
20 compliance with Do Not Call for \$4,500 per retailer? Do you
21 see that?

22 **MR. BICKS:** Objection, Your Honor, foundation.

23 **THE COURT:** Well, I -- what are you -- it says what it
24 says. I mean, what's your question about it?

25 Q. So 45 national sales partners times \$4,500, a little bit

1 over \$200,000, right?

2 A. Well, I don't -- I don't think that's necessarily the case.
3 I think that if you're referring to -- is this -- I'm not sure.
4 I mean, again, I don't have a context for the whole --

5 Q. Okay.

6 A. -- picture.

7 Q. So you weren't -- so even though you came in and testified
8 to the --

9 **THE COURT:** Okay. Now, Mr. Glasser, you'll remember
10 not to argue with the witness or make closing argument to the
11 jury in the form of a question.

12 Q. So whatever your -- so the level of your involvement with
13 the retailer side was not sufficient to have been involved in
14 this decision, correct?

15 A. The people who were involved in these things did ultimately
16 report up to me at the time, but I don't recall, as I sit here
17 today, having a discussion with anybody about this
18 specifically.

19 Q. Mr. Bicks showed you this retailer chat page dated -- it
20 looks like the chat was on January 16th, 2007. Do you agree
21 with that?

22 A. Yes.

23 Q. I take it you have no personal knowledge whether anybody
24 from SSN actually attended this chat?

25 A. No, we can't determine whether someone actually watches the

1 chat.

2 Q. So you don't know if anybody even watched the chat?

3 A. Well, I know people called in and asked questions, so we
4 did have people watch the chat; and then we followed the chat
5 up with a blast facts that outlined what was discussed on the
6 chat, and that goes to all retailers.

7 Q. Okay. It says right here: "Do not represent yourself or
8 your company as DISH Network or a DISH Network employee." Do
9 you see that?

10 A. I do.

11 Q. All right. I'm showing you what's been admitted into
12 evidence in Sophie Tehranchi's deposition, which is an outbound
13 sales script dated February 1st, 2009. Do you see it?

14 A. I see it.

15 Q. Okay. And the first line says: Hi, my name is blank with
16 DISH Network. Do you see that?

17 A. I see that.

18 Q. Okay. Can you think of any way in which Exhibit 22
19 actually conforms to this rule?

20 A. It doesn't look like it conforms, and that wouldn't make me
21 happy.

22 Q. Okay. I understand from some witnesses in this case that
23 DISH Network personnel were regularly at SSN's office listening
24 to these calls. Would they, therefore, be in a position -- a
25 better position than you to know if SSN was holding itself out

1 as DISH itself?

2 A. If they listened to the calls and they used this script,
3 then they would have actually heard it actually happening, and,
4 yes, they would have had a better idea of whether it was
5 happening or not.

6 Q. So you weren't close enough to whatever relationship
7 existed with SSN to know how this happened, even though it was
8 against policy, right?

9 **MR. BICKS:** Objection, no foundation.

10 **THE COURT:** Well, overruled. You can answer.

11 **THE WITNESS:** Could you repeat the question, please?

12 Q. You didn't have close enough contact with SSN in 2009, '10,
13 and '11 to have any way to answer how this happens without
14 being inconsistent with policy? You don't have personal
15 knowledge sufficient to deal with it, right?

16 A. Well, it shouldn't have happened. I mean, I have enough
17 knowledge to know that when we lay out guidelines, the
18 retailers are supposed to conform to those guidelines, and if
19 they don't, then, you know, our people would -- would have a
20 discussion with them and figure out why and then take whatever
21 was appropriate action.

22 Q. Okay. Here's another policy of DISH that's been put into
23 evidence, Defendant's Exhibit 2, which is a policy about
24 retaining call records, okay.

25 Were you close enough to the SSN situation, Mr. DeFranco,

1 to know if they were abiding by this policy?

2 A. I don't know if SSN was properly retaining their call
3 records.

4 Q. Okay. If it were the case that your compliance staff found
5 out that they were not retaining call records, would you expect
6 them to take appropriate disciplinary action?

7 A. Yes.

8 Q. You were not close enough to the situation on the ground
9 with SSN to know if they were, in fact, following the policy
10 that they ought to scrub with PossibleNOW, right?

11 A. I'm sorry. Could you repeat the question again?

12 Q. You do not have enough personal knowledge of SSN to know
13 whether they were, in fact, scrubbing their call lists, as you
14 wished them to?

15 A. No, I didn't know.

16 Q. All right. If your compliance staff had actual knowledge,
17 was told by SSN, that they were not scrubbing, you would have
18 expected them to take action, right?

19 A. Yes.

20 Q. Do you agree that actions sometimes speak louder than
21 words?

22 A. Well, I think it depends. Words are action, or can be.

23 Q. Are empty words action?

24 A. Well, I don't know what you mean by "empty words."

25 Q. Do you believe breaking the law ought to have consequences?

1 A. Yes.

2 Q. Would you be more likely to speed if you were getting
3 10-dollar tickets or 500-dollar --

4 **THE COURT:** Well, sustained about speeding. Nobody in
5 the room wants to talk about speeding.

6 **MR. GLASSER:** Let me consult with cocounsel. I might
7 be done.

8 **THE COURT:** All right.

9 **MR. GLASSER:** Can we take a little break, 5 minutes?

10 **THE COURT:** No. I mean --

11 **MR. GLASSER:** Okay.

12 (Pause in the proceedings.)

13 **MR. GLASSER:** Your Honor, I'm finished with this
14 witness.

15 **THE COURT:** All right. Redirect?

16 **MR. BICKS:** Yeah, can we just pull up 0070 for a
17 minute?

18 **THE COURT:** Are you -- is this Defendant's Exhibit 70?

19 **MR. BICKS:** I think it's Plaintiff's.

20 **MR. GLASSER:** Plaintiff's Exhibit 70.

21 **MR. BICKS:** The exhibit he showed.

22 **REDIRECT EXAMINATION**

23 **BY MR. BICKS:**

24 Q. Mr. DeFranco, you were asked about this. You had never
25 seen it before, right?

1 A. Not that I recall.

2 Q. You've seen in your career sales pitches that companies
3 come out with to try to sell services? Have you seen that
4 before?

5 A. Yes.

6 Q. Does this look like a sales pitch?

7 A. I don't know.

8 Q. And you see the pricing at the bottom of some of these
9 activities. Do you know whether that's a pricing that was for
10 a retailer to pay as opposed to DISH?

11 A. I don't know.

12 Q. Can I show you Exhibit 22, that draft script, Plaintiff's
13 22 that was pulled up? You were shown this script. Do you see
14 this? Do you know, in your position, if anyone actually ever
15 even used this script?

16 A. I don't think this is the same one that I saw. Is it?

17 Q. Yeah, blow -- I was intending it to be.

18 **THE COURT:** He looked at the top of it.

19 Q. Do you see it?

20 **THE COURT:** It's hard to read on the screen.

21 **THE WITNESS:** Where it says, hi, my name is?

22 Q. Yeah.

23 A. I see that.

24 Q. Right. Do you know if anyone ever even used this script?

25 A. I don't.

1 Q. And if somebody used this script and DISH had said not to
2 do it, would this be contrary to DISH's instructions?

3 **THE COURT:** I'm sorry? If they used it and DISH said
4 don't do it?

5 MR. BICKS: Yeah, would that be contrary?

6 **THE COURT:** That's implicit in the question. You
7 need --

8 || MR. GLASSER: Objection.

9 Q. Well, did DISH make it clear to retailers to not represent
10 themselves as DISH? Was that one of the things that you all
11 tried to do?

12 A. This would have been incorrect based on direction we gave
13 to retailers if they used this script.

14 || MR. BICKS: Thank you very much.

15 **THE COURT:** Anything else for the Plaintiff?

16 || MR. GLASSER: Just one -- one thing.

RECROSS-EXAMINATION

18 | BY MR. GLASSER:

19 Q. You say you're familiar with the contract right?

20 A. Yes.

21 Q. And so you're familiar with --

22 A. The retailer agreement, is that --

23 Q. Yes, that's the contract?

24 | A. Yes.

25 Q. So you're familiar with the parts that set the incentives

1 and the pay, right? And I can pull it up if you want to look
2 at it.

3 A. I think if you're going to ask me about it, I would like to
4 see it, but, yes, I was involved in creating it.

5 **MR. BICKS:** Your Honor, this goes beyond the scope.

6 **MR. GLASSER:** No, it goes right to his question.

7 **THE COURT:** What?

8 **MR. GLASSER:** Your Honor, it will go right to the
9 exact question he raised.

10 **THE COURT:** I don't know what you mean by this
11 question that he raised.

12 **MR. GLASSER:** He raised the question about who would
13 pay this.

14 **THE COURT:** Oh, okay. Well, the witness said he
15 didn't know, so sustained.

16 Q. Well, let me say this. Didn't DISH have the power in the
17 contract to make the retailers pay this?

18 A. No, we can't make the retailers pay that.

19 Q. So if the contract says you can change the price in your
20 sole and absolute discretion, you don't believe you could shave
21 \$4,500 off each retailer?

22 A. The price of the programming?

23 Q. The price of the incentives paid to the retailers?

24 **THE COURT:** I'm sorry. I'm not following your
25 question.

1 Q. In the contract, doesn't it say we will pay you what we
2 want to pay you, and we can change it at any time in our soul
3 and absolute discretion? Does it say that?

4 A. You'll have to show me the section.

5 **MR. BICKS:** Your Honor, this --

6 **THE COURT:** Okay. You need to limit your questions to
7 the two documents that he asked about on redirect. So I'm not
8 following --

9 **MR. GLASSER:** I'm fine. I don't have anything
10 further.

11 **THE COURT:** Nothing. Okay.

12 You can step down, Mr. DeFranco.

13 **THE WITNESS:** Thank you, Your Honor.

14 **THE COURT:** Any other matters we can take care of
15 shortly in front of the jury for the Defendants today?

16 **MR. BICKS:** I don't believe so, Your Honor.

17 **THE COURT:** Okay. Ladies and gentlemen, it's been a
18 long week. I think the next witness may take a little bit.
19 We're just going -- I'm just going to let you go home a little
20 early today, let you out of school early, but we are making
21 good progress. We're not going to fall behind as a result of
22 letting you leave at 4:15.

23 Now, this is a long weekend. Monday is a holiday, so don't
24 come on Monday. Wait until -- come back on Tuesday. We will
25 start Tuesday morning at 9:30. Over the weekend, I would ask

1 you and suggest to you that you just put the case out of your
2 mind, think about other things, go about your business.

3 But particularly, you know, there is sort of a human
4 tendency to start forming an opinion once you start -- once
5 you've heard some facts and some evidence about a case. Please
6 resist that. You do have some more evidence to hear. You have
7 the closing arguments. You have my instructions on the law.
8 So over the weekend just try to put it out of your mind.

9 Should there be anything in the news media about the case
10 or on the Internet, don't read it or listen to it. If you run
11 into any of these folks in the parking lot or the grocery store
12 or anything like that, don't speak to them. They're not going
13 to speak to you if they see you outside the building. They're
14 not being rude. There's just not supposed to be any contact
15 between parties, lawyers and witnesses and jurors. Don't talk
16 to each other about the case. Keep an open mind and come back
17 Tuesday morning at 9:30.

18 All right. Leave your notes in the chair and I'll see you
19 all Tuesday morning.

20 (The jury left the courtroom.)

21 **THE COURT:** Okay. So the matters to take up at the
22 moment are -- I guess I can hear -- well, first let's take up
23 this question about Ms. McRae. What's her -- is that her last
24 name?

25 **MR. EWALD:** Tabor McRae.

1 **THE COURT:** Taber McRae. So I read the brief that the
2 Defendant filed and I understand your position. I would -- I'm
3 just going to let the Plaintiff speak first because I got your
4 position.

5 **MR. EWALD:** Sure.

6 **THE COURT:** I would be inclined to let -- well, let me
7 just say to both of you all I would be inclined to let the
8 witness testify very specifically and narrowly about the
9 specific questions asked of Ms. Tehranchi and her answers.
10 Well, the witness wouldn't be asked about Ms. Tehranchi's
11 testimony, but the witness could be asked her own testimony
12 about those matters which came up in Ms. Tehranchi's testimony
13 which you identified in your brief, but, you know, not to go
14 beyond that like we would with an ordinary witness about the
15 larger responsibilities of a witness, larger views, et cetera,
16 about the case or facts or evidence. But in terms of six or
17 seven questions, I'm not sure I really have a problem with
18 that, but I'll be glad to hear from you all further from the
19 Plaintiff as to whether that's agreeable. And then if the
20 Defendant is seeking to do anything different than that,
21 they'll have to let me know go ahead.

22 **MR. BARRETT:** Your Honor, we do not believe the
23 witness should be permitted to testify for the following
24 reasons.

25 One, she was excluded as a witness based on DISH's failure

1 to comply with Rule 26 by disclosing her in a timely fashion
2 and you had stated in your order correctly that she may be
3 called solely for impeachment purposes. Because it's very
4 important to comply with Rule 26, as the Court's orders have
5 stated, solely for impeachment is a very narrow exception to
6 the Rule 26 obligation and what that means is -- solely for
7 impeachment means just that. You cannot use a witness solely
8 for impeachment to bolster your case substantively. There's
9 abundant authority for that.

10 And the reason they want to use her is to bolster their
11 case substantively on an issue on which they've already been
12 heard by several witnesses, including Ahmed and Musso, and they
13 both testified that DISH did not review the scripts. Okay.
14 This is not solely for impeachment. Solely for impeachment
15 would be putting someone on the stand to rebut Mr. DeFranco's
16 testimony about DISH's -- you know, the seriousness with which
17 DISH takes its own personal telemarketing obligations. Okay.
18 That would be a solely for impeachment witness. This is
19 bolstering the case substantively, not solely for impeachment.

20 And the case that I would cite that addresses this, one is
21 from the District of Maryland. It's called *Newsome* and it's
22 437 F.Supp.2d 431 from 2006.

23 **THE COURT:** 437 F.Supp.2d.

24 **MR. BARRETT:** 431.

25 **THE COURT:** 431. Who was the judge?

1 **MR. BARRETT:** I do not. District of Maryland.

2 **THE COURT:** Well, there is a judge up there who used
3 to be a magistrate judge and now he is a district judge. His
4 name is slipping my mind, but if you said it, I would remember,
5 and he's really good at this kind of stuff, so I just was
6 wondering if it was that judge.

7 **MR. BARRETT:** I hope it is, yes.

8 **THE COURT:** Okay.

9 **MR. BARRETT:** What that opinion holds is that
10 impeachment evidence which also possesses a substantive quality
11 cannot be said to fit the "solely for impeachment"
12 classification.

13 This is substantive evidence. They've known for years that
14 we have this evidence about script reviews. This is their
15 employee. They never disclosed this person and Your Honor
16 correctly excluded the witness because they never disclosed
17 this person. This person is not being offered solely for
18 impeachment, but it's instead a third witness that DISH wants
19 to bring it in that it never properly disclosed to support
20 Ahmed and Musso. Ms. Taber she should be excluded and should
21 not be permitted to testify.

22 **THE COURT:** All right.

23 **MR. EWALD:** Your Honor, your order seemed to clear to
24 me that Ms. Taber McRae can be brought solely for use of
25 impeachment. I think this is a classic impeachment by

1 contradiction. Ms. Tehranchi says X; and as we laid out in our
2 brief, Ms. Taber McRae will say, no, that isn't the case. And
3 we are planning to bring her to testify on those limited issues
4 and I would only add probably just to introduce who she is, why
5 she is here to the point of the juror with the Five9 witness by
6 depo designation who he didn't know who it was, so we would
7 need to give some context. But there are some specific
8 statements which Ms. Taber McRae will say are wrong, and
9 they're about her and what she observed. So I think it is well
10 within Your Honor's order and we are only attempting to provide
11 it on a limited basis, 15-minute testimony or so.

12 And I would note too that Ms. Taber McRae is in Nevada and
13 is, as far as we know, willing to come. Her husband was
14 recently diagnosed with cancer and she was not able to come
15 this week because she is in treatment with him. We are hopeful
16 she'll be able to show up on Tuesday.

17 **MR. BARRETT:** Your Honor, one thing I neglected to
18 mention is that they're claiming surprise based upon deposition
19 testimony that was taken in 2013. Okay. This is
20 Ms. Tehranchi's deposition testimony. Their lead counsel in
21 this case, Eric Salad (phonetic), previous to this firm, took
22 that deposition. So how can they claim to be surprised and in
23 need of an impeachment witness for someone they deposed almost
24 four years ago.

25 **MR. EWALD:** I did not claim surprise, Your Honor.

1 They put this evidence into trial by designating that
2 deposition and therefore, under Your Honor's order, we believe
3 we have the right to call Ms. Taber McRae to impeach those
4 specific statements that we cite in our brief.

5 **THE COURT:** All right. Okay. Well, let me take a
6 look at it tomorrow morning; and because I have some skills
7 with our electronic docket, but not others, the best you're
8 going to get from me is a text order because I don't actually
9 know how to file a paper order, I'm happy to say, but I do know
10 how to do a text order. So what I would anticipate is if
11 I'm -- if I find it fairly simple, I'll let you know tomorrow;
12 and if it takes me a little more time or thought, I'll let you
13 know sometime Sunday; and that's what I will commit to you --

14 **MR. EWALD:** Thank you, Your Honor.

15 **THE COURT:** -- is that you will have a ruling by close
16 of what would be the business day if Sunday were a business
17 day. I'll try to do it tomorrow, though. Okay. But I feel
18 like I need to read the case that the Plaintiffs have directed
19 my attention to and shouldn't decide before I do that. All
20 right.

21 **MR. EWALD:** Thank you.

22 **THE COURT:** Now, the only other thing I have on my
23 radar as undecided is Defendant's Exhibit 25. That's the P --
24 the PossibleNOW report. Is there anything else that I have
25 tabled that I have forgotten about that the Plaintiff wants to

1 remind me of?

2 **MR. BARRETT:** I don't think so.

3 **MR. GLASSER:** No, Your Honor.

4 **THE COURT:** Okay. What about the Defendant? Have I
5 forgotten anything else?

6 **MR. BICKS:** I'm not -- no.

7 **THE COURT:** Okay. So now I've heard a right fair
8 amount about this, obviously, today and I'm going to think
9 about it a little bit further, but I want to be sure I give --
10 I don't want -- I'm not trying to get you to repeat what you've
11 already told me, but if I have not given you a chance to say
12 everything about it that you want to say, because you know,
13 we've been at it kind of haphazard, I want to be sure I give
14 you that -- you know, that I've given everybody a chance to say
15 what they want to about that.

16 Does the Plaintiff have anything else they want to say
17 about that?

18 **MR. BARRETT:** No, Your Honor.

19 **THE COURT:** No. Okay. The Defendant?

20 **MS. ECHTMAN:** I just want to add one more thing. I
21 made all the arguments about why I think it should come in
22 substantively on its own and I think it actually could help
23 streamline our case because if Your Honor admits that we can
24 drop one of our experts because I think that will make a point
25 we want to be able to make in closings to the jury.

1 **THE COURT:** Okay.

2 **MS. ECHTMAN:** It will help streamline the case and
3 otherwise it should come in.

4 **THE COURT:** Well -- all right. I'm going to do the
5 same thing about this one and -- did you want to say anything
6 in response?

7 **MR. GLASSER:** Yes, ma'am. Could we have time to file
8 a quick brief on this one because I don't think it's going to
9 hit any of the foundation requirements for the hole they're
10 trying to put it through.

11 **THE COURT:** Okay. Since I have a lot of work to do
12 this weekend on this and other matters, tomorrow at five
13 o'clock?

14 **MR. GLASSER:** Yes, ma'am.

15 **THE COURT:** Okay. And any response Sunday at
16 two o'clock?

17 **MR. EWALD:** Yes, Your Honor.

18 **MS. ECHTMAN:** Sure.

19 **THE COURT:** Okay. We'll all work all weekend. You
20 all would have been working all weekend probably anyway, but
21 I'm happy -- you can file it electronically. It will pop up by
22 the miracles of technology on my computer screen and I will
23 read it.

24 What is the Defendant's anticipation as to where we're
25 going to be on Tuesday? I just -- you know, one of the things

1 I'm going to be doing this weekend is working on my jury
2 instructions; and if you are going to rest your case Tuesday
3 morning at eleven o'clock, I need to know that now.

4 **MR. BICKS:** Yeah. We're shooting, Your Honor, to be
5 done by the close of business Tuesday.

6 **THE COURT:** Okay.

7 **MR. BICKS:** And if it leaked into Wednesday, it's a
8 shot. As you know, lawyers are notoriously bad at time
9 estimate. I put myself at the top of the list. But I think
10 the goal is we're trying to get done at the end of the day
11 Tuesday.

12 **THE COURT:** Okay. Often, it's my experience,
13 lawyers -- maybe it's because I have a heavy thumb, but, you
14 know, sometimes people take less time than they say they're
15 going to. And who are you anticipating calling? I know
16 there's this issue about an expert that you may or may not call
17 depending on the ruling on Defendant's 25.

18 **MR. BICKS:** Right. So we've got Debra Aron, who is
19 the rebuttal to their expert Ms. V, and then we've got Mike
20 Mills, who was here. He went home for his daughter's birthday.
21 He's going to come back Monday. Bruce Werner is a short
22 witness. I'm trying to decide if we really need him. He's up
23 in the air. I'll tell these folks when we figure it out. And
24 then we've got Ms. Taber, you know, 15 minutes. So -- and then
25 there's this fellow Dr. Fenili who talks about the PossibleNOW

1 report and that's prettily much the focus.

2 **THE COURT:** And Dr. Fenili is the one you might not
3 need if the report comes in?

4 **MR. BICKS:** Yeah, we would probably drop him if we got
5 that.

6 **THE COURT:** All right. Well, yeah, that ought to
7 even -- that's going to take most of the day Tuesday it sounds
8 like.

9 All right. Good. Well, I will try to have as much as I
10 can, not having heard all of the evidence, jury instructions
11 ready so that I will not be the cause of any delay in the
12 charge conference. I did print out the last proposed
13 instructions, which were filed in August -- at the end of
14 August. That's what I'm looking at. Has there been anything
15 since then? Did I miss something? It's entirely possible.
16 That's what I have in my hand, but I don't have the whole file
17 in front of me.

18 **MR. BICKS:** I'm looking to Mr. Ewald.

19 **THE COURT:** There's always somebody in charge of this
20 kind of thing.

21 **MR. BICKS:** It's not me.

22 **MR. EWALD:** Your Honor, I believe that is the last one
23 that was filed. We had -- well, two things I would add. One
24 is we had made some comments in the pre-instruction back and
25 forth --

1 **THE COURT:** Right.

2 **MR. EWALD:** -- where we told Your Honor if you're
3 inclined to go with the North Carolina standard jury charge
4 that we had a different proposal for you than what Plaintiffs
5 had.

6 **THE COURT:** Yes. Okay. That -- thank you. I do
7 remember that. So you're directing me to the -- I'm calling it
8 briefing.

9 **MR. EWALD:** If you give me one second, Your Honor, I
10 can tell you the ECF number.

11 **THE COURT:** This was when I sent out my rough draft
12 preliminary instructions and you all gave me some comments back
13 is what you're talking about.

14 **MR. EWALD:** Yes, Your Honor. We filed that on
15 December 8th --

16 **THE COURT:** Okay.

17 **MR. EWALD:** -- and it's our response to the Court's
18 proposed summary of applicable law.

19 **THE COURT:** And both sides filed something I remember,
20 so I'll definitely take a look at that again.

21 **MR. EWALD:** Your Honor, one other thing. We had
22 filed -- it all runs together now, but I believe it was after
23 Friday's teleconference we filed a --

24 **THE COURT:** I saw that supplemental authority, some
25 very long opinion from one of my colleagues in West Virginia --

1 **MR. EWALD:** Yes, Your Honor.

2 **THE COURT:** -- who talked about lots of stuff, but
3 some of it was actual authority.

4 **MR. EWALD:** Yes.

5 **THE COURT:** Okay. So that's good.

6 Now, if anybody has anything else that they want to me to
7 consider -- you know, I know the evidence isn't all in, but,
8 you know, just, you know, go ahead. Don't wait if it's
9 something you can do now. I know, you know, you may want to
10 hand it up at the close of all the evidence, but I'm not
11 promising to consider it if you wait that long, especially if
12 it's something that has -- we already know about now. So if
13 there's specific language that's not already in front of me
14 about anything in terms of the jury instructions, I would
15 greatly appreciate hearing about it this weekend so I can take
16 it into account. I mean, I'll be up here every day so -- at
17 least part of the time.

18 **MR. BICKS:** Sorry, Judge.

19 **THE COURT:** That's okay. I like trials. I'm happy to
20 be figuring out some jury instructions.

21 Anything else we need to do before we stop for the day for
22 the Plaintiff? No. For the Defendant?

23 **MR. BICKS:** No, Your Honor.

24 **THE COURT:** Okay. If we do finish all the evidence on
25 Tuesday, I would ask counsel to be available to stay late. You

1 know, one of the things we could do is have a -- like an
2 informal charge conference off the record and work through some
3 things; and then we could come in Tuesday morning, have the
4 jury come a little bit late, do a formal charge conference on
5 the record that might be less confusing for the appellate court
6 after we work through some things. So I just would ask -- I
7 mean, you all aren't local. You're not going to be doing
8 anything Tuesday night anyway, but I just would ask you to, you
9 know, keep that in mind. Or at least most of you, with two
10 exceptions, aren't local. You know, at least some of you would
11 be available Tuesday night in case that timing works out.

12 All right. I appreciate you all's efficiency. I'll see
13 you Tuesday morning at 9:30.

14 (Proceedings concluded at 4:35 p.m.)

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1 **C E R T I F I C A T E**

2 I, LORI RUSSELL, RMR, CRR, United States District Court
3 Reporter for the Middle District of North Carolina, DO HEREBY
3 CERTIFY:

4 That the foregoing is a true and correct transcript of the
5 proceedings had in the within-entitled action; that I reported
6 the same in stenotype to the best of my ability and thereafter
6 reduced same to typewriting through the use of Computer-Aided
6 Transcription.

7
8 

9 Lori Russell, RMR, CRR
10 Official Court Reporter

Date: 1/13/17

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